Public Benefits and Private Rights: Countervailing Principles of Eminent Domain

House Joint Resolution No. 34

Report to th 57th Legislature of the State of Montana

Volume I

Legislative Environmental Quality Council
Eminent Domain Subcommittee

Public Benefits and Private Rights: Countervailing Principles of Eminent Domain

Final Report to the 57th Montana Legislature
September 2000

Environmental Quality Council Members

House Members
Representative Paul Clark
Representative Kim Gillan, Vice-Chair
*Representative Monica Lindeen**
Representative Doug Mood
Representative Bill Tash
Representative Cindy Younkin

Senate Members
Senator Mack Cole
Senator William Crismore, Chair
Senator Bea McCarthy
Senator Ken Mesaros
Senator Barry "Spook" Stang
Senator Jon Tester

Public Members
Mr. Tom Ebzery
Ms. Julia Page
Mr. Jerry Sorensen
Mr. Howard F. Strause

Governor's Representative
Ms. Julie Lapeyre

Law, Justice, and Indian Affairs Committee Members on Eminent Domain Subcommittee
Representative Gail Gutsche
Representative Dan McGee
Representative Jim Shockley

*Eminent Domain Subcommittee members are noted in italics

Legislative Environmental Policy Office Staff

Todd Everts, Legislative Environmental Analyst; Larry Mitchell, Resource Policy Analyst; Mary Vandenbosch, Resource Policy Analyst; Krista Lee, Resource Policy Analyst; Maureen Theisen, Publications Coordinator; *State Capitol, P.O. Box 201704, Helena, MT 59620-1704; (406) 444-3742; http://leg.state.mt.us*

Eminent Domain Study Staff

Krista Lee, Resource Policy Analyst, Legislative Environmental Policy Office; Gordon Higgins, Research Analyst, Legislative Services Division; Greg Petesch, Chief Legal Counsel, Legislative Services Division

Table of contents

The Study of Montana's Eminent Domain Laws

Eminent Domain Historically

Eminent Domain in the Present

Eminent Domain in Montana's Future

Appendices

Companion Volumes

List of Illustrations

THE STUDY OF MONTANA'S EMINENT DOMAIN LAWS

CHAPTER I : THE NEED TO STUDY MONTANA'S EMINENT DOMAIN LAWS

INTRODUCTION -- ENVIRONMENTAL QUALITY COUNCIL STUDY -- A REVIEW OF THE INTERIM

Environmental Quality Council (EQC) Study Process

The Environmental Quality Council (EQC) is a 17-member bipartisan interim committee of the Montana Legislature. The 1999 Montana Legislature, through House Joint Resolution No. 34 (HJR 34) (see **Appendix 1**), asked the appropriate interim committee to study eminent domain and its use in Montana. In assigning the HJR 34 study, the Legislative Council requested that the Law, Justice, and Indian Affairs Interim Committee and its staff allocate resources to assist the EQC in the study process. In September of 1999, the EQC adopted a 1999-2000 interim work plan that included forming a subcommittee and allocating 1.0 FTE of the EQC's staff time in addition to the 0.5 FTE of the Law, Justice, and Indian Affairs Committee staff time to study eminent domain. The EQC appointed eight committee members and the Law, Justice, and Indian Affairs Committee appointed three committee members to serve on the Eminent Domain Subcommittee (Subcommittee).

THE LEGISLATURE CONCLUDED THAT A CAREFUL AND DELIBERATE STUDY WAS IN ORDER.

Because of the potential impact of the use of eminent domain in Montana, the Legislature concluded that in order to better understand the statutes, a careful and deliberate study was in order. As a result, the Legislature enacted HJR 34 requesting the appropriate interim committee to study the issue with the **goals** of:

(1) Studying the **implementation** of existing eminent domain statutes.
(2) Studying the **adequacy** of the current statutes.
(3) Determining the **need for and potential benefit of revising** the laws related to eminent domain.

The resolution requests that the study include the following elements:

- the frequency and distribution of condemnation actions in Montana;
- the types of interest in real property condemned in Montana;
- the extent to which rights-of-way obtained through the use of eminent domain are being resold or re-leased for uses other than the original purpose for which the land was condemned and the degree to which the original landowner is compensated for those new uses; and
- if the current statutes are adequate in respect to the following specific aspects:
  - due process;

- just compensation;
- burden of proof standards;
- the abandonment process;
- rights of reentry;
- reversions;
- methods for acquiring property or the use of property, including types of easements and restrictions on easements, and multiple use of easements.

HJR 34 also requested that the EQC prepare a report of its findings and conclusions and identify options and make recommendations, including legislation if appropriate, to the 57th Legislature.

Nature and Scope of the Environmental Quality Council Eminent Domain Study

The assertions made by HJR 34 did not identify public policy problems. Rather, the resolution provided the Subcommittee with areas of concern that, if they are truly problems, should be addressed from a statewide perspective. The power of eminent domain cannot be avoided, but the rights of private property owners can be balanced with the rights of the general public through a careful investigation of the statewide policy and the impacts of past practices related to the condemnation of private property for public purposes.

During the 56th Montana Legislative Session, HJR 34 was introduced by Representative Carley Tuss, calling for a study to be conducted by an appropriate interim committee on a number of issues inherent in the state's authority to exercise eminent domain. The resolution was ranked second out of 24 possible study resolutions for assignment during the 1999-2000 interim. Five bills were introduced during the session that were designed to make significant changes to the eminent domain statutes. While none of the bills were successful in their journey to the Governor's desk, the passage and assignment of HJR 34 allowed the stakeholders an opportunity to consider the matter of eminent domain in Montana outside the often frenetic pace of the 90-day legislative session.

Each of the following bills contributed to the policy questions raised by HJR 34.

House Bill No. 354 amended the eminent domain statutes by removing the right of the condemnor to take possession of the condemned property immediately after the District Court issues a preliminary condemnation order. The bill attempted to protect the condemnee from actions of the condemnor that occur before the appeal process has been exhausted. Also, when the condemnor is a private entity and is already in possession of the property, the condemnor would have been required to reach agreement with the condemnee to remain in possession while the appeal process runs its course.

House Bill No. 355 added a new section to Title 70, chapter 30, that removed any landowner liability for any actions of the condemnor relative to the use of the property. The bill also amended section 70-30-111, MCA, to require that in addition to demonstrating that the condemnation is necessary for the accomplishment of an authorized public use, the

condemnor must offer clear and convincing evidence that an interest in the land greater than an easement is necessary to achieve the use. Finally, the bill added language to section 70-30-309, MCA, expressly stating that any order granting an easement to a private person or entity must limit the use for which the original easement was requested.

House Bill No. 573 made major changes to the eminent domain statutes in reference to common carrier pipelines. The bill added a new section that required pipelines transporting hazardous substances, as defined by section 75-10-701, MCA, to indemnify the landowner whose property was taken from any damages caused by the operation of the pipeline. Additionally, the section required the common carrier to post a surety bond with the Montana Department of Environmental Quality, which was designed to compensate any injured parties for damages caused by the operation of the pipeline.

The bill also made major changes to section 70-30-111, MCA, relative to the facts necessary for allowing a condemnation to occur. In essence, the condemnation could not be initiated until an environmental impact statement was completed, a certificate of environmental compatibility was issued, and the condemnor collected signatures from 60% of the landowners impacted by the project presumably demonstrating that the proposal was acceptable.

Further, the condemnor was required to show that the public use was authorized by a master plan, if one was adopted, and by any applicable zoning regulation for each political jurisdiction where the taking is proposed.

House Bill No. 28 attempted to address the fact that many private landowners lack the legal ability to access their property and have not established prescriptive easement rights. The bill added private roads over private property to the list of public uses in section 70-30-102, MCA. The bill also specifically provided the procedure for determining the compensation amount offered to the condemnee and outlined the reimbursement for costs that the condemnee may receive if the initial award is challenged and the condemnee is the prevailing party.

Senate Bill No. 461 removed the power of eminent domain from pipelines and other delivery systems (water, heat, gas, electricity, telecommunications, etc.) for projects that would parallel or roughly parallel the route of an existing pipeline or other delivery system. The bill precluded other uses on land taken by condemnation proceedings for the initial use unless the owner of each parcel of the condemned property consents to the additional use and is compensated appropriately.

HJR 34 offered researchers, committee members, and interested persons a detailed plan of action. Careful reading of the resolution set the stage for an educational process as well as an opportunity to truly assess whether or not the current use and application of eminent domain authority has fundamental problems and whether any identified predicaments could be remedied through the recommendation of statutory changes. However, regardless of the recommendations offered by the Subcommittee members and members

of the public, the findings and conclusions stage of this study served to provide the most recent update on the background and use of eminent domain in Montana.

The preamble of HJR 34 attempted to establish a number of agreed-upon statements that served to provide a context within which a decisionmaking body might investigate the tenets of eminent domain. Three statements are particularly important. First, eminent domain rights were first granted to companies that engaged in the provision of a public service (i.e., public service companies, electric utilities, railroads, etc.). Second, because the concept of eminent domain is not well-understood, many landowners believe that their property rights are not protected by Montana's statutes or constitutional provisions or by the United States Constitution. Finally, the resolution stated that condemnation proceedings are intended to be a last resort for failed negotiations between the condemnor and the condemnee.

In terms of actually studying eminent domain, the resolution clearly stated three tasks. The first urged the Subcommittee to study the implementation of the eminent domain laws. Uncovering the frequency and distribution of condemnation actions in Montana, the types of interests in real property that are being condemned, and the extent to which rights-of-way are being resold or leased for uses not identified in the original condemnation complaint served to create a concise but useful understanding of the process and impacts that the exercise of eminent domain has on private property owners and the Montana public generally.

> HJR 34 STATED THAT CONDEMNATION PROCEEDINGS ARE INTENDED TO BE A LAST RESORT FOR FAILED NEGOTIATIONS.

The second task asked the Subcommittee to study the adequacy of the statutes as they relate to the rights of property owners and the state under eminent domain. Doctrines such as due process, just compensation, burden of proof, and public uses combined both a study of the legal interpretations of the court as well as the historical treatment of public policy by the Legislature. These concepts serve to limit the otherwise unlimited and inherent power that the state has to condemn property. Issues, such as the abandonment of uses, reversion of property that was taken, rights of reentry, differences among the types of interests taken, and the multiple-use of easements, are all products of the basic principles of eminent domain. Analyzing whether the current statutes are sufficient to protect the interests of both primary stakeholders leads directly into the third assignment.

The final duty was to determine, after establishing the findings and conclusions, whether the statutes governing eminent domain were in need of revision. Essential to that task was the identification of need and the potential benefit of recommending statutory changes. This study did not take into consideration eminent domain related to tribal lands.

Review of the Interim

To carry out the study request of HJR 34, the Subcommittee adopted a study work plan that outlined the goals and tasks necessary to complete the study by September 30, 2000. The Subcommittee's work was submitted to the full EQC for review and approval. In addition to their regularly scheduled public meetings, the Subcommittee also held public hearings in Helena, Missoula, and Billings, with an estimated turnout of 135 people.

Figure 1 outlines the Subcommittee's HJR 34 study process throughout the interim.

Figure 1. Eminent Domain Subcommittee's Interim HJR 34 Study Process

May 1999

- ✗ Create Eminent Domain Subcommittee
- ✗ Generate Draft Study Work Plan
- ✗ Compile historic use and basic eminent domain information

September 1999

- ✗ Information and issue analysis
  - Eminent domain introduction
  - Basics of eminent domain
  - Review of eminent domain statutes
  - Eminent domain case law review
  - Eminent domain condemnation process delineated
  - Use of eminent domain in other states
  - Historical use of eminent domain in Montana--input requested from entities with authority to condemn
  - Coordination and multiple use of interest obtained
  - Identify current eminent domain issues
- ✗ Hold public meeting in Libby

December 1999

- ✗ Information and issue analysis
  - Concepts associated with eminent domain
  - Panel discussion on pipeline bonding, mitigation measures, and standards
  - Update on historical use of eminent domain in Montana
  - Compare entities authorized to exercise the right of eminent domain in other states with those granted the authority in Montana
  - Discuss results of case study conducted on a Montana Department of Transportation project
  - Discuss reversion of property obtained through eminent domain proceedings once the property is no longer needed or being used
- ✗ Develop final work plan--approved by EQC
- ✗ Hold public meeting and hearing in Helena.

January 2000

- ✗ Information and issue analysis
  - Concepts and definitions associated with eminent domain
  - Possession of property by plaintiff panel discussion
  - Update on reversion of property process
  - Discuss federal/state relationship in eminent domain proceedings
  - Compare identified public uses in other states
  - Discuss liability associated with type of interest obtained
  - Discuss the legal use of the interest taken through condemnation actions
  - Review due process allowed in eminent domain statutes, burden of proof standards in eminent domain laws, and the right of reentry
- ✗ Study expectation review
- ✗ Hold public meeting and hearing in Missoula
- ✗ Preliminary discussion of findings and conclusions
- ✗ Discuss format of Eminent Domain Handbook
- ✗ Hold public hearing in Missoula

February 2000

- ✗ Information and issue analysis
  - Eminent domain and related issues
  - Possession of property by the plaintiff
  - Reversion of property
  - Historical use update
  - Federal/state relationship
  - Public uses
  - Liability
  - Use of interest taken through condemnation action
  - Due process
  - Burden of proof
  - Rights of reentry
- ✗ Development of findings and draft recommendations
  - Eminent domain statutes in general
  - Liability
- ✗ Preliminary discussion of findings and draft recommendations

March 2000

- ✗ Information and issue analysis
- ✗ Development of findings and draft recommendations
  - Entities authorized to exercise the right of eminent domain
  - Federal/state relationship
  - Reversion of property
  - Mitigation measures
  - Standards and specifications
  - Possession of property by the plaintiff
  - Liability
  - Use of interest taken
  - Due process
  - Burden of proof
  - Rights of reentry
  - Type of interest taken
  - Public uses
  - Necessity/public interest
- ✗ Subcommittee review of Draft Eminent Domain Handbook
- ✗ Industry insight into the use of eminent domain
- ✗ Hold public meeting and hearing in Billings

April 2000

✗ Development of findings and draft recommendations
- Entities authorized to exercise the right of eminent domain
- Federal/state relationship
- Reversion of property
- Mitigation measures
- Standards and specifications
- Possession of property by the plaintiff
- Liability
- Use of interest taken
- Due process
- Burden of proof
- Rights of reentry
- Type of interest taken
- Public uses
- Necessity/public interest

May 2000

✗ Subcommittee review of findings and draft recommendation language
✗ Subcommittee review of Draft Eminent Domain Handbook
✗ Subcommittee review of draft final report
✗ Send out draft final report for 30-day public comment period

July 2000

✗ Review public comment received on draft final report
✗ Subcommittee final decision on any recommendations to the EQC
✗ Subcommittee final review Draft Eminent Domain Handbook
✗ Subcommittee briefs EQC on any recommendations

September 2000

✗ Final decision by EQC on the study report and recommendations, including content of proposed legislation
✗ Final approval by EQC of the Draft Eminent Domain Handbook
✗ Selection of bill sponsors if needed and development of session strategy

EQC Response to HJR 34

The Legislature requested that the EQC complete a number of study goals and tasks. These study goals and tasks and how the EQC responded to them are set out below.

HJR 34 Study Goals:

- **Study Goal:** Study the implementation of existing eminent domain statutes.

  Response: Figure 1 displays the EQC's efforts to openly and comprehensively study the implementation of existing eminent domain statutes. ***Chapter 7*** lists the findings and recommendations in regard to the implementation of eminent domain laws.

- **Study Goal:** Study the adequacy of the current eminent domain statutes.

  Response: The EQC addressed the adequacy of the current statutes through the use of panel discussions, presentations from interested parties, solicitation of comments from interested parties, comparison to other states' laws, and information generated by staff research. Much of the information that was gathered in an effort to determine adequacy is contained in ***Chapters 1 through 7*** of this report.

- **Study Goal:** Determine the need for and potential benefit of revising the laws related to eminent domain.

  Response: Through public hearings, panel discussions, staff generated reports, targeted solicitation of input from interested parties, and careful study of current laws, the EQC produced findings and recommendations specific to this study goal. These findings and recommendations can be found in ***Chapter 7*** of this report.

HJR 34 Study Tasks

- **Study Task:** Review the frequency and distribution of condemnation actions in Montana.

  Response: The EQC requested historical condemnation statistics from entities with the authority to exercise the right of eminent domain. The entities that responded to the request provided the number of condemnation actions that their company or agency had completed in the last 50 years. This information can be found in ***Chapter 2, Figure 2.*** The entities were categorized by government and non-government.

- **Study Task:** Identify the types of interest in real property condemned in Montana.

  Response: The types of interest that may be taken are identified and discussed in ***Chapter 6*** of this report.

- **Study Task:** Identify the extent to which rights-of-way obtained through the use of eminent domain are being resold or re-leased for uses other than the original purpose for which the land was condemned and the degree to which the original landowner is compensated for those new uses.

  Response: The EQC requested input from interested parties on the use of easements or the interest taken. Information addressing this issue is contained in ***Chapter 6.***

- **Study Task:** Determine if the current statutes are adequate in respect to the following specific aspects: due process, just compensation, burden of proof standards, the abandonment process, rights of reentry, reversions, methods for acquiring property or the use of property, including types of easements and restrictions on easements and multiple use of easements.

  Response: The EQC reviewed staff research papers and input from interested parties on the adequacy of the identified areas. A more detailed explanation of the information can be found in ***Chapter 4 and Chapter 6.***

- **Study Task:** That the EQC, prior to September 30, 2000, be requested to prepare a report of its findings and conclusions and identify options and make recommendations, including legislation if appropriate, to the Governor and the 57th Legislature.

  Response: This report fulfills this study task.

EQC Assigned Additional Study Tasks

- **Study Task:** Review eminent domain case history.

  Response: ***Chapter 2*** provides an overview of eminent domain court case history.

- **Study Task:** Compare eminent domain statutes of states around the region.

  Response: ***Chapter 3*** contains a comparison between Montana's eminent domain laws and those of other states in the region.

- **Study Task:** Conduct a case study of a project that has been completed by an entity that has the authority to exercise eminent domain in an effort to gather public comment from those directly affected by a project.

  Response: The EQC conducted a case study by mailing a questionnaire to all of the entities involved in a recent highway construction project. This case study is further discussed in ***Chapter 5.***

- **Study Task:** Define the entities that possess the authority to exercise the right of eminent domain in Alabama, Arizona, California, Colorado, Idaho, and Nevada. Compare these entities with those authorized to exercise the right in Montana.

  Response: The EQC reviewed staff research papers outlining the entities authorized to exercise the right of eminent domain in the above-mentioned states and compared those to Montana's entities with authority to exercise the right of eminent domain. ***Chapter 3 and Chapter 5*** discuss this in more detail.

- **Study Task:** Outline the federal/state relationship on eminent domain cases--specifically those that are initiated at the federal level. Define the state's level of concurrence on projects, if any.

  Response: The EQC reviewed research papers developed by staff discussing the federal/state relationship and what role the state plays in federal eminent domain actions. ***Chapter 3*** provides more insight into this study task.

- **Study Task:** Review Montana law related to possession of property by the plaintiff (condemnor) in condemnation actions. Determine if current statutes are adequate.

  Response: The EQC heard a panel discussion from interested parties regarding the current process defined in law and suggestions for improvements or changes and the potential impacts of those improvements or changes. ***Chapter 6*** further discusses possession of property by the plaintiff.

- **Study Task:** Review Montana laws related to liability and determine if there needs to be specific language for property obtained through eminent domain actions.

  Response: ***Chapter 4*** discusses liability as a legal concept and provides a detailed description of liability.

- **Study Task:** Discuss the public uses identified in Montana statute. Determine if these public uses are still needed and appropriate.

  Response: ***Chapter 4*** provides information related to the public uses enumerated in Montana law.

- **Study Task:** Review the current method of determining just compensation and determine its adequacy and fairness.

  Response: ***Chapter 4*** discusses the issue of just compensation in more detail.

- **Study Task:** Review the process for determining the necessity of a project. Determine if the current process for determining necessity and public interest is adequate.

  Response: ***Chapter 4*** discusses necessity and public interest and the process for their determination in more detail.

- **Study Task:** Conduct public hearings to gather information from interested persons across Montana.

  Response: ***Figure 1*** delineates the public hearings and public meetings that were held to meet this study task.

- **Study Task:** Develop a Draft Eminent Domain Handbook for public distribution.

  Response: The Draft Eminent Domain Handbook has been published as a separate report. The handbook will incorporate any changes made to the eminent domain law during the 57th Legislative Session and will be finalized after the close of the session.

CONCEPTS AND DEFINITIONS RELATED TO EMINENT DOMAIN

HJR 34 stated that the use of eminent domain is not well-understood. It also urged the Environmental Quality Council (EQC) to study the implementation and adequacy of Montana's eminent domain statutes. The concepts and definitions section is intended to address three objectives: (1) to provide definitions to commonly used terms and concepts; (2) to identify where these terms and concepts are found in the Montana Code Annotated as they relate to the exercise of eminent domain; and (3) to offer, when applicable, examples of Montana case law that govern the exercise of eminent domain. Providing definitions to many of the common terms used while discussing eminent domain assisted the EQC in framing the questions raised by HJR 34 and will result in policymakers possessing consistent information to make informed decisions.

The primary definitions pertaining to legal terms or concepts have been gathered from *Black's Law Dictionary, 6th ed.* (1990). Additional sources have been used to clarify, expand, or otherwise apply the conceptual definitions to specific Montana cases or situations. In those situations, the sources have been cited. A chapter reference has been provided for those terms that are addressed in more detail in this final report. These chapters relate to the key questions raised by HJR 34 and provide a detailed description of how these concepts work in eminent domain cases in Montana.

A. Abandonment (See Chapter 4, Reversion or Sale of Property When Use is Abandoned, and Chapter 6)

> Abandonment is the relinquishing of a right or interest with the intention of never reclaiming it.

Montana law defines abandonment in relation to highways and railroads.

60-1-103, MCA, concerning highways, provides:

> "Abandonment" means cessation of use of right-of-way or an easement or cessation of activity on the right-of-way or easement with no intention to reclaim or use again. Abandonment is sometimes called vacation.

60-11-110, MCA, concerning railroads, provides:

> For purposes of this part, "abandonment" means the relinquishment of property, both real and personal, and the discontinuance of railroad services. Abandonment may be accomplished by voluntary act or by formal procedure.

✗ ***Burden of Proof*** (See Chapter 4)

Burden of proof is a concept that determines which party has the duty to prove a disputed charge or assertion. The term is also used in connection with the level of proof required in a specific instance.

Within the framework of the exercise of eminent domain, the burden of proof shifts between the condemnor and condemnee as the process proceeds. Initially, as provided in section 70-30-111, MCA, the condemnor has the duty to show by a preponderance of the evidence that the public interest requires the proposed taking.

> **70-30-111. Facts necessary to be found before condemnation.** Before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings:
>
> (1) that the use to which it is to be applied is a use authorized by law;
>
> (2) that the taking is necessary to such use;
>
> (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
>
> (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

If the initial burden of proof under section 70-30-111, MCA, is met by the condemnor, then the burden shifts to the condemnee to show that the taking has been excessive or arbitrary. In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 Mont. 235, 696 P.2d 989 (1985), the trial court found that the sewer district had not shown necessity for the taking of defendants' properties because it failed to demonstrate a reasonable present need or even a need in the reasonably foreseeable future to connect defendants to the sewer system. The condemnor had not carried its burden, and the decision of the trial court was affirmed by the Montana Supreme Court.

When determining who has the burden of proof on the subject of just compensation, the Court, in State ex rel. Dept. of Highways v. Donnes, 219 Mont. 182, 711 P.2d 805 (1985), stated that the condemnee has the burden in eminent domain proceedings to prove entitlement to just compensation in excess of that offered by the condemnor.

✗ ***Clear and Convincing Evidence*** see Chapter 4, Burden of Proof Pertaining to the Exercise of Eminent Domain

Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain.

This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but is less than the standard of beyond a reasonable doubt standard required in criminal trials. Clear and convincing evidence means that there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.

✗ *Condemnation*

Condemnation is the determination and declaration that private property is assigned for a public use, subject to just compensation. It is also the exercise of eminent domain.

60-1-103, MCA, defines "condemnation" for highway purposes as:

"Condemnation" means taking by exercise of the right of eminent domain.

Excess Condemnation

Excess condemnation is the taking of property beyond what is needed for a public use.

Inverse Condemnation

Inverse condemnation is an action brought by a property owner for compensation against a governmental entity that is alleged to have taken property without bringing formal condemnation proceedings.

Quick Condemnation (Quick Take)

Quick condemnation or quick take is an act of taking property for public use, whereby the estimated just compensation is placed in escrow until the actual amount of compensation can be established.

✗ *Condemnee*

A condemnee is an individual or entity whose private property has been taken to satisfy a public use or public benefit.

✗ *Condemnor*

A condemnor is a public or private entity that takes private property for a public use.

In Montana, the Legislature has provided specific condemnation authority to certain private entities. For example, section 69-13-104, MCA, grants common carrier pipelines permission to exercise eminent domain powers. Railroad companies have been given eminent domain powers under section 69-14-552, MCA. Section 35-18-106(9), MCA, gives the power of eminent domain to rural cooperative utilities.

✗ ***Due Process*** (See Chapter 4)

Due process is the conduct of legal proceedings according to the established rules and principles for the protection and enforcement of private rights.

The right to due process is guaranteed in the 5th and 14th Amendments to the United States Constitution as well as in Article II, section 17, of the Montana Constitution. Within the general definition are two specific definitions:

Procedural Due Process

Procedural due process comprises the minimal requirements of notice and an opportunity for a hearing guaranteed by the due process clauses of the state and federal constitutions, especially if the deprivation of a significant life, liberty, or property interest may occur.

Substantive Due Process

Substantive due process is the doctrine that the due process clauses of the state and federal constitutions require legislation to be fair and reasonable in content and to further a legitimate governmental objective.

✗ ***Easement*** (see Chapter 6)

An easement is an interest in land owned by another person, consisting in the right to use or control the land or an area above or below it for a specific limited purpose. Land benefiting from an easement is called the dominant estate. Land burdened by the easement is called the servient estate. Easements may last in perpetuity. Easements do not give the holder the right to possess, take from, improve, or sell the land.

60-1-103, MCA, defines "easement" for highway purposes as:

"Easement" means a right acquired by public authority to use or control property for a designated purpose.

The legal definition of dominant and servient estate is also found in Montana statutes. In this case, estate and tenement have the same meaning.

> **70-17-103. Dominant and servient tenement.** The land to which an easement is attached is called the dominant tenement. The land upon which a burden or servitude is held is called the servient tenement.

The general rule applied to legal questions concerning the maintenance of easements states that the dominant estate or tenement is responsible for maintaining the easement.

The primarily recognized uses of easements are:

- a right-of-way;
- a right of entry for a purpose relating to the dominant estate;
- a right to the support of land and buildings;
- a right to light and air;
- a right to water;
- a right to engage in some act that would otherwise be defined as a nuisance; and
- a right to keep or place something on the servient estate.

Within the general definition of an easement, there are specific definitions that apply.

Easement in Gross

An easement in gross is an easement that benefits a particular person and not a particular piece of land. The beneficiary does not usually own any land adjoining the servient estate. This condition is most usually found in cases in which an entity has acquired an easement for a public use such as a fiber-optic cable, pipeline, or electrical transmission line.

Appurtenant Easement

An appurtenant easement is an easement that is created to benefit another tract of land, the use of the easement being incident to (dependent upon or subordinate to) the ownership of the other tract.

✗ *Eminent Domain*

Eminent domain is the inherent power of the government or an assigned agent to take private property and convert it to public use, subject to the requirement to pay just compensation to the property owner.

60-1-103, MCA, provides:

"Eminent domain" means the right of the state to take private property for public use.

✗ ***Fair Market Value*** (See Chapter 4, Just Compensation and the Exercise of Eminent Domain)

Fair market value is the price agreed to by a willing seller and a willing buyer conducting business in an arm's-length transaction.

In Montana, the appraisal process used to determine the fair market value of property to be condemned may include the consideration of the highest and best use of the property (70-30-313(1), MCA). This generally refers to a use that will produce the most value or profit. The best and highest use does not necessarily have to be the use in effect at the time of the appraisal.

70-30-313. Current fair market value. Current fair market value is the price that would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) the highest and best reasonably available use and its value for such use, provided current use may not be presumed to be the highest and best use;

(2) the machinery, equipment, and fixtures forming part of the real estate taken; and

(3) any other relevant factors as to which evidence is offered.

✗ ***Fee Simple Title*** (See Chapter 6)

Fee simple title is an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.

Fee Simple Absolute

An estate of indefinite or potentially infinite duration. This means an ownership interest in property that is free from any conditions or limitations.

70-15-203. Fee simple. Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

✗ *Just Compensation* (See Chapter 4)

> Just compensation is the fair payment made by a condemnor for private property that it has acquired through the use of eminent domain.

Just compensation is guaranteed through the Fifth Amendment to the United States Constitution and Article II, section 29, of the Montana Constitution. Usually, just compensation is the fair market value of the property as appraised.

> Liability is the quality or state of being legally obligated or accountable; legal responsibility to another or to society; enforceable by civil remedy or criminal punishment.

The general rule applied to legal questions concerning the liability of easement holders states that the dominant estate or tenement is liable for damage or injury to the servient estate or tenement.

✗ *Multiple Use (of Easements)* (See Chapter 6)

This term does not have a legal definition. The common meaning ascribed to "multiple use" is two or more activities (or public uses) sharing a common easement. It is assumed that the public uses are compatible and that one would not infringe upon the operation of the other.

Since "easement" is defined as a right acquired by public authority to use or control property for a designated purpose, each purpose or public use must be defined within a "multiple use easement" agreement.

✗ *Necessity or Necessary* (See Chapter 4)

> A necessity or necessary is a thing that is indispensable (to life).

Necessaries has the broader sense of "indispensable things," whatever the subject at hand may be. The more common word means "essential". (Bryan A. Garner, *A Dictionary of Modern Legal Usage,* 2d ed.)

> **70-30-111. Facts necessary to be found before condemnation.** Before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings:

(1) that the use to which it is to be applied is a use authorized by law;
(2) that the taking is necessary to such use;
(3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
(4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

Applying this definition to eminent domain, as Garner allows, suggests that the term "necessary" as used in section 70-30-111(2), MCA, could mean that "the taking is *essential or indispensable* to such use". However that is not the standard applied by Montana courts.

In Butte, Anaconda & Pac. Ry. v. Mont. Union Ry., 16 Mont. 504, 41 P. 232 (1895), the Montana Supreme Court held that the word "necessary", as used in a statute of this character, does not mean an absolute necessity for the particular location sought but a reasonable necessity to be determined from the considerations of practicability, economy, and facilities under the particular circumstances of the case, having regard to senior rights and the benefits to the public.

In State ex rel. Dept. of Highways v. Standley Bros., 215 Mont. 475, 699 P.2d 60 (1985), the Court stated that the word "necessary" in this statute does not mean an absolute or indispensable necessity but rather a reasonable, requisite, and proper means to accomplish the improvement. This standard has been consistently followed by Montana courts.

✗ ***Preponderance of the Evidence*** (See Chapter 4, Burden of Proof Pertaining to the Exercise of Eminent Domain)

Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

This is the burden of proof in a civil trial, in which a jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. (See the definition of clear and convincing evidence for a contrast.)

Section 70-30-111, MCA, requires that the condemnor must show by a preponderance of the evidence that the public interest requires the taking.

✗ ***Public Use*** (See Chapter 4)

Public use is the public's right to use property or facilities through condemnation.

In states throughout the West, the term "public use" as it applies to eminent domain has been expanded through case law and statutory definitions to include a broader collection of ideas and public policy choices. As western states expanded to meet the needs of a larger citizenry, "use by the public" came to mean "public benefit", "public welfare", and "general welfare". Recognizing and utilizing the vast natural resources present within their borders, western states, including Montana, created conditions that allowed and encouraged a more charitable use of eminent domain in relation to the state's natural resources. While this expansion has allowed for a liberal assessment of what purposes may be public, it does not preclude the people of Montana from actually using a project that has been determined to be a public use. In Montana the determination of what constitutes a public use is solely a legislative responsibility.

Montana Power Co. v. Bokma, 153 Mont. 390, 457 P.2d 769 (1969), the Court stated:

> Thus, in Montana a public use is one which confers some benefit or advantage to the public. Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a "public advantage" or "public benefit" accrues sufficient to constitute a public use.

While property rights continue to be in need of preservation and protection, they are thought to be elastic enough to allow the promotion of a public good when landowners are justly compensated.

✗ *Reversion* (See Chapter 4)

> Reversion is a future interest in land arising by operation of law whenever an estate owner grants to another particular estate, such as a life estate or a term of years, but does not dispose of the entire interest.
>
> **70-15-210. Reversion.** A reversion is the residue of an estate left by operation of law in the grantor or his successors or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

In the eminent domain context, reversion means that if property taken for a public use by means other than fee simple is abandoned or no longer used for the public use, the title to the property reverts to the landowner or the landowner's successor in interest.

✗ *Right of Reentry* (See Chapter 6)

Right of reentry is a future interest retained by a grantor after conveying a fee simple subject to a condition subsequent, so that the grantee's estate terminates (upon breach of the condition) only if the grantor exercises the right to retake it.

> **70-1-505. Right of reentry or repossession transferable.** A right of reentry or of repossession for breach of condition subsequent can be transferred.

While under the common law, a right of reentry upon land after breach of a condition subsequently incorporated in a deed does not constitute an interest in real property and is therefore not susceptible of conveyance. Under section 70-1-505, MCA, such a right may be transferred. Waddell v. School District, 79 Mont. 432, 257 P. 278 (1927).

✗ *Right-of-Way* (See Chapter 6)

Right-of-way is: (1) A person's legal right, established by usage or contract, to pass through property owned by another; or (2) the right to build a railroad or highway on property owned by another.

60-1-103, MCA, defines "right-of-way" for highway purposes as:

> "Right-of-way" is a general term denoting land, property, or any interest in land or property, usually in a strip, acquired for or devoted to highway purposes.

✗ *Sovereign Right of State*

Sovereign right of state is a unique right possessed by a state or its political subdivisions that enables it to carry out its official functions for the public benefit. It also refers to a body that possesses an independent existence or a body vested with independent and supreme authority.

✗ *Vested Rights*

A vested right is a right that definitively belongs to an entity and cannot be impaired or taken away without the entity's consent or compensation.

EMINENT DOMAIN HISTORICALLY

CHAPTER 2: EMINENT DOMAIN IN HISTORY

EMINENT DOMAIN HISTORICALLY

House Joint Resolution No. 34 requested that the Subcommittee address various questions related to eminent domain. These questions included but were not limited to: (1) How is eminent domain being implemented? (2) Are the current eminent domain statutes adequate? (3) Is there a need for and potential benefit to revising Montana's eminent domain laws? To answer these questions and in order to clearly understand how the eminent domain process functions in Montana, the Subcommittee felt it was important to review the history of eminent domain. The current eminent domain law has evolved throughout the century from various court interpretations and directions on behalf of the Legislature and court system. To fully understand how Montana's eminent domain law became what it is today, a brief review of Montana's historical eminent domain laws and court cases was provided to the Subcommittee. This chapter provides a brief overview of the detailed review that the Subcommittee requested.

THE LEGISLATURE ASKED IF THERE WAS A NEED FOR AND POTENTIAL BENEFIT TO REVISITING MONTANA'S EMINENT DOMAIN LAWS.

Dominium Eminens: Historic Use and Variations

Eminent domain is the power of the sovereign to take property for public use without the owner's consent.[1] The important concepts to note are taking, public use, and without consent. As will be expounded upon later, the *public use* provision has been altered to *general welfare*, *welfare of the public*, *public good*, *public benefit*, or *public utility or necessity*.[2] Additionally, modern treatment of eminent domain provides for just compensation when private property is taken.

The first encounters with the concept of eminent domain were likely the actions of biblical kings; however, it was during the rise and flourish of the Roman Empire that eminent domain began to take on the principles that modern states now utilize, that is, the taking of private land for a public purpose. As the Romans built massive thoroughfares and aqueducts, the ancient planners were clearly engaging in endeavors that resulted in a public purpose, even if that purpose was to maintain Rome's dominance over the known world (at least from a Western point of view).

When the Roman Empire fell and was replaced with a feudal system that only loosely resembled a government from the modern perspective, the idea of eminent domain vanished. The foundation of eminent domain is that the state has the power to take private property. Since individual rights were hard to identify and most likely harder to come by during this period in history, the sovereign simply took what it wanted. Whether the taking was couched in the desire to provide for some public purpose had little to do with the sovereign's pretense.

In England, as early as 1544, Parliament granted municipal governments the ability to take privately held land for highways and water supply delivery systems when compensation was granted. As England's colonies were formed, English law had a measurable impact on the colonial governments' own view of civic powers. However, in America, the difference became the explicit requirement that a public purpose be realized before the taking could occur.

It wasn't until 1625 that a Dutch attorney, Hugo Grotius, recognized as the world's leading expert on international law, coined the phrase *dominium eminens* and that eminent domain entered our vernacular. Grotius wrote that "the property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property . . . for ends of public utility . . . . But it is to be added that when this is done the state is bound to make good the loss to those who lose their property . . . ".[3]

Thus, as eminent domain is defined by Grotius, it encompasses the sovereign's power (whether exercised or not) to take private property if such a taking is for public use and if just compensation is given to the private property owner. This is the basis for Montana's constitutional and statutory treatment of eminent domain.

Sovereign Power: Assertions and Limitations

The power of eminent domain comes into existence with the establishment of the government and continues as long as the government endures. It does not require recognition by constitutional provision or statute, but exists in absolute and unlimited form.[4] However, subscribing to this view requires an assertion of some limitation on the sovereign's power. Limitations are provided by constitutional and statutory provisions governing due process of law, definitions of purposes for which eminent domain may be exercised, and requirements that property may not be taken unless the property owner is justly compensated.

Another important principle of eminent domain is that no act, be it legislative or otherwise, may be established that causes the state to surrender its right to take any property within the limits of the state when it may be required for public use. Thus any statute that declares that the power of eminent domain shall not be exercised in whole or in part is invalid.[5]

Inherent Powers of the Sovereign

By virtue of being a government, the sovereign has inherent powers that are fundamental to the legitimacy and durability of the government. Vesting these powers in the state provides it with the sufficient legal authority to accomplish its purposes. Those three powers are the power to tax, the power to police, and the power to condemn.[6]

While all three powers affect property rights and each must be exercised for a valid purpose, there are essential differences among them. As stated, eminent domain refers to the taking of private property for some enumerated public use. The power to tax, in

contrast, refers to the sovereign collecting contributions for the support of governmental services or to meet some authorized governmental expenditure. The only compensation received by the taxpayer is the government protection accorded or the benefits of the expenditure. The distinction between police powers and eminent domain is less clear given that both are used to advance some public benefit. However, a physical taking and compensation for the taking are really the defining issues. Recently, discussions of regulatory takings, justified under the state's police powers, have dominated court proceedings in relation to property rights. A detailed discussion of regulatory takings and the policy questions integral to this subject is beyond the scope of this eminent domain review.

Therefore, it is important to note that the Constitution of the United States (or the Constitution of Montana) does not grant the state the power of eminent domain. Nor do the statutes grant this power. Rather, the Constitution and the statutes *limit* the power of the state.[7] In the case of the United States Constitution, it is the 5th and 14th Amendments that place the important limits on the inherent authority of the government by stating that the sovereign may not take private property for public use until it has justly compensated the owner for the loss. Both constitutions also guarantee that private property holders are given due process before such a taking occurs.

It is generally acknowledged that the capability to exercise the power of eminent domain is the exclusive dominion of the Legislative Branch.[8] In exercising that power, the Legislature may delegate it to the Executive Branch, municipalities, private corporations, and individuals, so long as the property taken is for a public use.[9] In Montana, the Legislature has granted this power to other, nongovernmental entities, in essence public service corporations (local government also has the ability to exercise eminent domain), and has enumerated those purposes believed to be public uses.[10] Regardless of who actually exercises the power, since just compensation is not part of the inherent power, an owner who has lost property pursuant to the exercise of eminent domain has no remedy unless a constitutional provision like the takings clause is in effect. Montana chose this approach, not to reiterate its ability to exercise this authority, but to ensure that the public purposes and the agents operating on behalf of the state do not travel beyond the appropriate uses of eminent domain power.

Historical Use of Eminent Domain in Montana

HJR 34 was specific in requesting that the study of existing eminent domain statutes include reviewing the frequency and distribution of condemnation actions in Montana. In an attempt to gather this data, staff contacted numerous private and public entities to provide information on their use of eminent domain through actual condemnations in the last 50 years. The numbers of replies that the Subcommittee received were limited. Many private entities were unable to locate specific condemnation numbers due to their recordkeeping process.

In discussions with companies throughout the state, it was evident that property is usually condemned only when all other options have been exhausted. A majority of companies

would much rather negotiate with landowners, change routes, etc., to prevent the necessity of condemnation proceedings. In considering the number of miles of pipeline, telephone wire, electric wire, railroad, highway, etc., through Montana, the number of condemnations is very small. In fact, some companies couldn't find any condemnation proceedings in their records.

Below are quotes from some of the information that the Subcommittee received from entities with the authority to exercise the right of eminent domain:

"Surveys of our member[s] indicate condemnations have rarely, if ever, been employed. However, it is important to keep in mind that the existence of the power of eminent domain is an important tool in bringing landowners to the bargaining table in certain instances."

"[We] only condemn properties that cannot be obtained through negotiation, usually to address three primary situations:

- *landowner will not negotiate or refuses to voluntarily sell [the company] the necessary rights;*
- *landowner and company have large disagreements over the value of the rights;*
- *the landowner is unable to provide clear title to the rights they are selling because of some cloud on their title."*

"One of our projects covered 400 landowners and we only had to do actual condemnations on 2 landowners."

"We use the power of eminent domain on a routine basis as we negotiate right of way. It is a critical tool that keeps parties at the table to resolve issues. A property owner is more willing to negotiate knowing we can do something else. Losing that right would make it more difficult to obtain easements for our facilities. It is also critical that we have this government granted tool available to get our facilities in place so we can provide services to consumers since government requires us to provide those basic services. Rarely does it go to court and an actual condemnation proceeding."

"We have used eminent domain power (where condemnations actually took place) only several times in the past five years."

"On a project that included 89 landowners, we did not have any condemnations."

"To my knowledge, Range [Telephone Cooperative] has never used the power of eminent domain to secure an easement."

"In the 26 years I have been with Blackfoot [Telephone Cooperative], we have never used our right of eminent domain to acquire any right of way or property. Clark Fork [acquired exchanges from US West in 1994] began the eminent domain process with one customer about two years ago, but it was resolved very early in the process with the customer accepting our offer for the short stretch of right of way."

"InterBel [Telephone Cooperative] has never used the power of eminent domain."

There are two primary types of actions that have resulted in complete condemnations (those that actually go through the court process) in Montana. The first is new lines our routes. The second is on contract renewals. Historically, many easements were term easements that expired after 20 or 30 years. When the term expired, companies would renegotiate with the landowners for new easement terms. Occasionally companies were unable to agree on these new easement terms and the result would be a condemnation proceedings.

Below are tables that show the number of condemnations for the entities from which information was received.

Figure 2. Historical Use of Eminent Domain in Montana.

GOVERNMENT

Bonneville Power Administration

	1947	1951	1951	1951	1958	1967	1969	1972	1982	1982
# of Condemna-tions	5/ 193*	5/ 197	4/ 356	4/ 216	3/ 155	9/ 134	3/ 152	1/4	1/8	32/ 145
Percentage Condemned	3%	3%	1%	2%	2%	7%	2%	25%	13%	22%

	1983	1984	Total
# of Condemna-tions	1/7	22/ 112	90/ 1679
Percentage Condemned	14%	20%	5%

*5 condemnations out of 193 property owners.

This graph depicts only the projects where condemnation occurred. It does not include any projects that might have had 0 condemnations.

Montana Department of Transportation

	1990	1991	1992	1993	1994	1995	1996	1997	Total
# of Condemnations	45/ 660	81/ 962	58/ 599	31/ 599	29/ 557	26/ 468	14/ 394	16/ 468	300/ 4707
Percentage Condemned	7%	8%	10%	5%	5%	6%	4%	3%	6%

+Estimates based on number of parcels that have gone to legal services vs. total number of parcels in the tracking system. May not have actually condemned through court but were negotiated through legal services.

Montana Fish, Wildlife, and Parks

	1975	Total
# of Condemnations	1/1	1/1
Percentage Condemned	100%	100%

+Only property this entity has acquired by eminent domain. This government entity is very limited by statute on its use of eminent domain.

PRIVATE

Entity #1

	All Years	Total
# of Condemnations	0	0
Percentage Condemned	0%	0%

Entity #2

	All	Total
# of	0	0
Percentage Condemned	0%	0%

Entity #3

	1991	Total
# of Condemnations	1	1
Percentage Condemned	?	?

Entity #4,# 5, & #6

	All Years	Total
# of Condemnations	0	0
Percentage Condemned	0%	0%

Statutory Changes to Eminent Domain Laws in 1983

The passage and assignment of HJR 34 during the 1999 Legislative Session signaled the most recent legislative action on eminent domain statutes since the 1983 session. Three bills were passed in 1983 that made a number of changes to Title 70. The intent of the changes was most likely to provide a greater measure of landowner protection from condemnor abuse of discretion. However, the changes of 1983 did not change the substance of the power to exercise eminent domain or the types and nature of uses for which eminent domain could be exercised. The following is a brief description of the changes by section.

✗ 70-30-104, Estates and rights in land that may be taken.

Original estates and rights in land that may be taken were not changed, but legislation added that a leasehold or other interest, for as long as the interest taken is necessary for the legally authorized public use, may be subject to condemnation. The new language also added that fee simple title could be acquired.

✗ 70-30-111, Facts necessary to be found before condemnation.

This section was amended to require that the condemnor must show by a preponderance of the evidence that the taking is authorized by law and that the taking is necessary to the use. If the taking is legally authorized and necessary, the condemnor must have made an effort to obtain the interest outside of filing a condemnation complaint and that offer must have been rejected.

Prior to 1983, the law simply required that the taking must *appear* to meet the necessary requirements and that no initial offer to the condemnee was required.

✗ 70-30-202, Jurisdiction and venue.

Prior to 1983, no requirement was in place to notify the condemnee of the proposed taking. The changes forced the condemnation complaint to include a notification to allow the landowner to file an answer to the taking. If the landowner does not file an answer within 6 months of receipt of the summons, the process moves forward on the complaint.

✗ 70-30-203, Contents of the complaint.

The substance of the complaint was altered to include the condemnor's statement of necessity as outlined in section 70-30-111, MCA.

✗ 70-30-206, Powers of the court.

The changes expanded the power of the court to limit the interest in real property sought if the court finds the interest sought is not necessary. The court authority was further clarified to ensure that the court had the power to determine whether the condemnor has

met the burden of proof under section 70-30-111, MCA, and that the preliminary condemnation proceedings shall commence as expeditiously as possible while being mindful of the rights and interests of both condemnor and condemnee. The preliminary condemnation hearing was required to be heard by a court sitting without a jury.

✗ 70-30-207, Appointment of commissioners.

A number of qualifications were removed from the statute governing the type of individual who may serve as a commissioner to decide the amount of the award. The only new prerequisite for appointment of commissioners was the requirement that the appointee must reside in the county where the condemnation complaint is being heard. New language was added to require a timeframe in which a condemnee must file a claim for compensation and acceptance or rejection of the claim by the condemnor.

✗ 70-30-311, Putting plaintiff in possession.

The major change to this section provided that if the condemnee fails to provide a statement of claim of just compensation within the time required in section 70-30-207, MCA, the condemnor may obtain an order for possession subject to the condition that the condemnor's payment into court shall be made within 10 days of receipt of the condemnee's claim for award.

✗ 70-30-313, Current fair market value.

The provision that the highest and best use that is reasonably available is admissible as evidence to the fair market value of the property being condemned did not change under the legislation. However, language was added to ensure that the current use may not be presumed to be the best and highest use.

✗ 70-30-321, Sale of property acquired for public use when use abandoned.

This section was amended to provide for reversion of property when the interest in the property is an interest other than fee simple. In the case of an easement, for instance, the easement reverts back to the original owner or the owner's successor in interest when the use has been abandoned.

✗ 70-30-204 and 70-30-205 were repealed by action of the 1983 Legislature. These sections addressed the content of the summons and who may answer to the initial condemnation complaint. The substance of the two sections has been incorporated in other areas of Title 70.

Summary of Eminent Domain Cases

Early cases addressing eminent domain focused on the authority of the state to condemn land for a stated public purpose. While legal issues, such as due process rights and the

determination of compensation, were considered, the courts and states mainly grappled with defining and refining their legal authority to exercise eminent domain.

In the case of Kohl v. United States, 91 U.S. 367 (1875), the U. S. Supreme Court declared that the federal government's power to exercise eminent domain was legitimate under the Fifth Amendment. The case dealt with condemning private property for the erection of courthouses and post offices. Prior to Kohl, the federal government allowed the individual states to act as the federal government's agent in condemnation proceedings.

Within the annals of eminent domain proceedings and discussions, the Legislature's determination of public use is the final word. However deferential the courts may seem at times, they will require the state to justify its declaration of public uses. The U.S. Supreme Court, in United States v. Gettysburg Electric Ry. Co., 160 U.S. 668 (1896), offered as much by stating:

> . . . when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation.

In the City of Cincinnati v. Louisville & Nashville RR Co., 223 U.S. 390 (1912), the United States Supreme Court addressed the question of condemning property that was already being held for a public use. The property in question was a riverfront that offered the public a wharf along the Ohio River. The Railroad Company sought to condemn a strip of the land for an elevated railway. After the Railroad initiated the condemnation proceedings, the City of Cincinnati attempted to prevent the taking.

In this case, the Court offered a number of principles that impacted the manner in which eminent domain was addressed by both statute and case law. The first finding addressed whether the power to condemn property was limited by the United States constitutional prohibition on state laws that impaired the obligation of contracts. The Court stated that the obligation of a contract was not impaired by eminent domain proceedings when the condemnation results in a public purpose and just compensation is provided to the property owner.

In an early attempt to establish a meaningful description of the inherent right of the sovereign to exercise the power of eminent domain, the Court rejected the City's claim that the power of eminent domain established under the governing ordinances of the Northwest Territory was lost once the territory was admitted to the Union as the State of Ohio. The Court relied on the following case to reconcile its decision. In Escanaba & Lake Michigan Transp. Co. v. City of Chicago, 107 U.S. 678 (1883), the Court stated:

> Whatever the limitations upon her powers as a government whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a state of the Union. On her admission, she at once became entitled to and possessed all the rights of dominion and

> sovereignty which belonged to the original states. . . . Equality of constitutional right and power is the condition of all the states of the Union, old and new.

Recognizing the generally accepted treatment of eminent domain being an inherent and essentially unlimited right of the sovereign, the Supreme Court, in United States v. Jones, 109 U.S. 518 (1883), stated:

> The provision found in the fifth amendment to the federal constitution, and in the constitutions of the several states, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised.

In Berman v. Parker, 348 U.S. 26 (1954), the District of Columbia Redevelopment Act of 1945 was held to be constitutional by the U.S. Supreme Court. The case involved a congressional act allowing redevelopment of blighted areas. The contention was that since the redevelopment authority was under private control, the private authority had an obligation to make it a public use. The legal question to be decided was whether the use was indeed public, given the fact that the entity administering the redevelopment area was a private corporation. In finding the Act constitutional, Justice Douglas summed up the decision in two pithy statements. First, Douglas concluded:

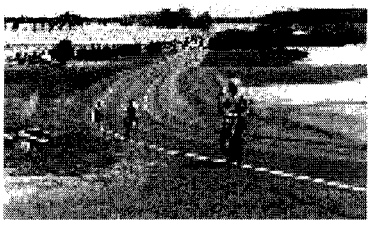
> We deal in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Second, in a rather matter-of-fact fashion, Douglas stated, "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."

In each of these cases, the Court was extremely deferential to the power of the sovereign, while simultaneously seeking to protect the right of the property owner from unnecessary takings. These cases represent the Court's effort to establish the principles espoused in eminent domain by offering case law as justification for the power.

Public Use: A Western Interpretation -- Five Cases

In its purest form, public use has been held to mean a reasonable right of the public to use the property that has been condemned. Commodities, such as the generation and distribution of electricity, telephones, railroads, and highways, are public uses because in each instance the condemnor is obligated to provide a service or goods to the public without condition. Central to this concept is the notion that most of these uses are regulated by the state.



Some courts have held that public use is any public benefit that is material and necessary to the development of the state's natural resources. An opposite view is that to constitute a public use, the public or some appreciable part of it must assume control of the property taken or that the right to use the property must pass to the state or the public.

Three western states do not subscribe to the public benefit doctrine (Washington, Oregon, and California) but rather follow the use-by-the-public doctrine. These states have statutory lists detailing the public purposes under which the exercise of eminent domain is valid that are as exhaustive as Montana's. However, in those cases, if a private corporation exercises its power of eminent domain, it must do so under a strict public use definition--in essence, allowing the public to use the service or property as a right and not subject to the company's private determinations.

COMMODITIES, SUCH AS THE GENERATION AND DISTRIBUTION OF ELECTRICITY, TELEPHONES, RAILROADS, AND HIGHWAYS, ARE PUBLIC USES.

Of the states that adhere to the public benefit doctrine, Colorado, Idaho, and Wyoming list the public purposes in their constitutions.[11]

In a series of cases around the West, legislatures and state courts expanded the previously narrow definition of public use to account for a common belief that as the West expanded, so did the need for providing for the public benefit. In Gravelly Ford Canal Co. v. Pope and Talbot Land Co., 178 P. 150 (California, 1918), and Smith v. Cameron, 210 P. 716 (Oregon, 1922), the courts used a strict use-by-the-public definition to determine the appropriateness of condemnations. However, as conditions and needs changed, so did the courts' interpretations.

In the California decision of Gravelly, a case that involved a mutual irrigation company seeking to condemn a right-of-way through the defendant's land to construct an irrigation ditch for 17,000 acres, the Court ruled that the new irrigation project was not a public use based on the knowledge that the project was devoted only to the private land in question and was not available to the public, nor served to benefit the public in a reasonable way--this in spite of the fact that the plaintiff relied upon a statute that allowed irrigation as a public use.

The Oregon decision rendered in Smith v. Cameron came to a similar conclusion as in Gravelly. The plaintiff sought to increase the size of an existing irrigation ditch by condemning the necessary land of the defendant. Again, the plaintiff in this case relied upon the statutory authorization governing the exercise of eminent domain for the right to expand an existing irrigation system. The Court ruled in favor of the defendant stating that no public use was involved in the taking, thus depicting the condemnation as unconstitutional. The Court took the opportunity to offer its interpretation and definition of public use. The Court stated that public use must be defined and considered in terms of a duty devolving on the individual or corporation to furnish the public with the use intended. In effect, the Court took the position that the public must be entitled as a matter of right to use or enjoy the taken property.

A turning point in this line of thinking came during Healy Lumber Co. v. Morris, 74 P. 681 (Washington, 1903). The case involved a lumber company that condemned private land and water in order to be able to reach a thoroughfare as authorized under the Washington statutes. The Court allowed the condemnation to stand, but conceded that there are decisions that held that a public use existed when the community or state would enjoy a material benefit from such a condemnation. The Court added, however, that such an interpretation was an unwarranted extension of the eminent domain doctrine and tended to encroach on private property rights.

In Nash v. Clark, 75 P. 371 (Utah, 1904), a Utah decision, the plaintiff sought to condemn a right-of-way in a ditch owned by the defendant for the purpose of conveying water to the plaintiff's land. Relying on a statute that stated that when an existing irrigation ditch exists on another's land and another desires to convey water for beneficial use, the person shall have the right to enlarge the irrigation system by compensating the original owner for the damages caused.[12] The Court suggested, in its opinion, that the advancement of the public good required a broadened interpretation of the eminent domain laws.

An early Montana case using this broadened interpretation was Butte, Anaconda & Pacific Ry. v. Mont. Union Ry., 16 Mont. 504, 41 P. 232 (1895).

The plaintiff wanted to condemn the defendant's right-of-way to the extent of allowing its lines to cross the defendant's tracks and spurs. Both railroads hauled ore. The court stated that:

> In thus ingrafting upon the law of this jurisdiction the doctrine that the magnitude of the interests involved may properly become a determining factor in sustaining the right of a railroad to construct lateral branches, tracks, and spurs to mines and mining works, as public uses, by virtue of the law of eminent domain, we are always duly mindful, not only of the constitutional guaranty of the individual right of possessing and protecting property, but are equally impressed with the declaration that "the good of the whole" is the very foundation of the constitution . . . . The force of the principle may vary in different communities . . . it is imminently reasonable and appropriate that the conditions of the whole people to be affected should be considered.

While the Court admitted that other routes were possible, the obstacles were such that construction would be cost-prohibitive. Since mining was the economic engine of Montana and many other entities were directly and indirectly dependant on a viable mining industry, the Court determined that the condemnation should be allowed.

The purpose of these examples is to demonstrate that western states' treatment of eminent domain relied heavily on two concepts. The first is that the climate and geographical conditions present in the West made irrigation and water use a paramount need, which in turn created an opening to apply a more liberal interpretation of public use and necessity to challenged condemnations. The second condition was that as western states grew rapidly by recognizing and utilizing the vast natural resources present within their borders, allowing that a more charitable use of eminent domain in relation to the state's natural resources would translate into a public benefit. While property rights were and continue to be in need of preservation and protection, they are thought to be elastic enough to allow the promotion of public good when landowners are justly compensated.

Montana

Eminent domain refers to the authority of the sovereign to take private property when the public interest requires it, regardless of whether the private property owner provides consent.[13] The Montana Territorial Statutes defined and "granted" the power of eminent domain. In the two pre-1889 codifications of the territorial laws, eminent domain was defined as " . . . the right of the people or government to take private property for public use".[14]

In Article II, section 17, of the Montana Constitution, private property owners are protected from arbitrary and capricious condemnations by the due process clause. The clause states that "No person shall be deprived of life, liberty, or property without due process of law."

In Article II, section 29, the Montana Constitution asserts that:

> Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

The language contained in the 1972 Constitution mirrored the language contained in the 1889 Constitution with one important addition. Modern framers added that the necessary expenses arising from litigation must be added to the compensation award resulting from the taking. Testimony given during the Constitutional Convention made reference to the fact that allowing the prevailing party to be compensated for the costs of challenging condemnation actions would allow an additional opportunity for private property owner protection.[15]

Historic Montana Court Cases

While there are dozens of Montana cases dealing with eminent domain, the concepts and principles that the following cases contain serve to illustrate the role of the judiciary in its search to define the power of condemnation and protect the rights of private property owners. Balancing these two concepts yields some interesting viewpoints. As with all cases considering eminent domain, several matters of law must be decided. The first is whether the condemnor has the legal authority to initiate eminent domain proceedings and whether the proposed project is one authorized by law. The second question attempts to uncover answers related to the necessity of the taking and which party is responsible for proving the necessity, or conversely, the excessiveness of the taking. Third, the District Court in which the condemnation petition is entered must ensure that the process governing the award of compensation is valid and appropriate. Finally, Article II, section 17, of the Montana Constitution provides for the due process of law. Taken together, these issues begin to define the scope of the judiciary in determining whether a proposed condemnation balances the principles of public benefit and the least private harm. Each of the cases below represents the Court's judgment on a number of issues inherent to eminent domain. While other cases exist and would most certainly contribute to the development of an in-depth knowledge of eminent domain, these cases were chosen based on the fact that each addressed one or more of the key concepts of eminent domain.

IN ALL CASES CONSIDERING EMINENT DOMAIN, SEVERAL MATTERS OF LAW MUST BE DECIDED.

Helena Power Transmission Company v. Spratt, 35 Mont. 108, 88 P. 773 (1907)

This case involved the condemnation of property for the purpose of constructing a dam for the generation of electric power. The condemnor in this instance was a foreign corporation that had complied with the state's law relative to doing business as a foreign corporation. The issues before the Court were whether the purposes for the condemnation were public uses and whether a business incorporated under the laws of another state could exercise eminent domain in Montana.

The appellants argued that even though the public could receive electricity from the project and benefit from the irrigation project that was integral to the construction of the dam, the primary use was a private one enjoyed by an industrial company. They argued that in order for the condemnation to be valid, the use by and for the public must be clearly distinct from any mere private use. The Court disagreed and found that the taking of land for the purpose of providing electricity to industrial enterprises and the general public would support the initiation of condemnation proceedings.

On the second matter, that of foreign corporations exercising eminent domain, the respondent claimed that even though the exercise of eminent domain is a right granted by

the Legislature, that right is granted for the purpose of fulfilling some public use. In essence, the right to condemn may arise by implication. The Court disagreed and held that no legal authority existed in state law or the Montana Constitution that allowed a corporation not organized in Montana to condemn land.

State Highway Commission v. Yost Farm Company, 142 Mont. 239, 384 P.2d 277 (1963)

The state sought to condemn land owned by three parties along a proposed route for the construction of the "North Frontage Road of the new Montana Interstate". The Highway Commission had issued the usual condemnation order declaring that it had adopted the necessary resolution declaring the route part of the interstate project and had entered into an agreement with the United States Department of Commerce for the expenditure of federal funds. In the condemnation order, the Commission asked that the District Court uphold the condemnation based on the fact that the frontage road was a public use authorized by law and that the public interest required the taking. The District Court denied that the taking was necessary for the public interest. The Supreme Court affirmed the District Court decision by reiterating the judiciary's authority to determine necessity as well as whether the legal authority existed to condemn property.

In Yost, the state argued that the District Court did not have the authority to determine necessity nor did the District Court have the power to determine that the public interest requires the taking. In essence, the State claimed that the Commission offered a resolution stating the necessity of the taking, therefore that the statutes governing judicial power were nullified. The District Court wrote that they were confused by the state's argument and requested that the Supreme Court make a finding on this issue declaring that if that was the case (as the state contended), condemnation hearings were no longer required to be held in the District Court. The Supreme Court, citing the statutes, clearly confirmed that the District Court has the authority and the responsibility to determine necessity.

State Highway Commission v. Crossen-Nissen Company, 145 Mont. 251, 400 P.2d 283 (1965)

The State Highway Commission filed a petition to condemn land needed to reroute Highway 2, thus bypassing the City of Harlem. The District Court denied the Commission the right to condemn the property based on its determination that the taking did not balance the greatest public good with the least private injury. The Supreme Court reversed the judgment and allowed the condemnation to take place.

It is important to note that in this case, Crossen-Nissen did not dispute the necessity of building the highway. However, they did dispute that there was no necessity to build the highway along the route proposed by the Highway Commission. Relying on the statutory test for determining necessity, the District Court interpreted "necessary" to mean that the property is indispensable to the project.[16] The Supreme Court stated that the term "necessity" means that the property taken is reasonably requisite and proper for the completion of the proposed project.

Relying on previous cases regarding the judiciary's role in determining the appropriateness of the delegation of eminent domain authority, the Supreme Court also asserted that it was not its function to act as an engineer, thus substituting the Court's judgment for that of a qualified specialist.[17] The Court simply stated that the highway had to be built somewhere. In this case, the Highway Commission not only has the authority to condemn land, but it is in the position of offering the best evidence of a particular route.

Finally, the Court stated that it was "incumbent upon the defendant to show fraud, abuse of discretion, or arbitrary action in order to defeat the action of the Commission". Since the Commission was acting within the boundaries of its discretionary authority, it had only to demonstrate that the proposed taking was reasonably necessary for the completion of the project.

State Highway Commission v. Danielsen, 146 Mont. 539, 409 P.2d 443 (1965)

This case dealt with a condemnation action by the Highway Commission to construct a new highway between the towns of Poplar and Brockton. The District Court ruled that the taking was not the most compatible with the least private injury and denied the condemnation. The Supreme Court upheld the lower court's decision on the basis that the Commission's proposed route was an abuse of the Commission's discretion and authority. Once again, this case hinged on the issue of necessity.

As was the case in Crossen-Nissen, the real question of necessity asked in Danielsen was not in relation to whether the taking was necessary for the completion of the project or even whether the project itself was necessary. Rather, the necessity question rested on the balance of public good and private injury. The Court concluded that the Commission proved that it abused its discretion by admitting it could have "merely drawn straws" as a method of choosing the proposed route.[18] This determination created the condition under which the responsibility of proving necessity fell to the condemnor. Since the state failed to do so by its own admission of evidence that any of the proposed routes would have been appropriate, the Court ruled in favor of the property owner.

State Highway Commission v. Wheeler, 148 Mont. 246, 419 P.2d 492 (1966)

The Highway Commission sought to condemn private land for construction of a portion of the interstate highway. This case addresses a number of issues related to just compensation and the responsibility of the condemnor to construct a project in a manner consistent with the least private harm. The District Court awarded the landowner a sum to which the state objected. The Supreme Court upheld the decision and required that the state construct and maintain an underpass from one side of the highway to the other at the state's expense.

The Court determined that the District Court properly considered the impact that the project would have on the property owner under the statutory authorization provided for in section 93-9911(1), R.C.M. 1947, indicating that "The courts of this state are by statute charged

with the duty of protecting private property both from the eager slide rule of the engineer-architect and the arbitrary decision of an administrative board that enforces his action."[19]

In effect, regardless of whether the stated use is a public one, the state has the obligation of constructing this project in a manner that results in the least harm to the landowner. The Supreme Court found no merit in the state's claim that the cost of the construction of the underpass was not the state's responsibility, but the responsibility of the landowner.

Montana Power Company v. Bokma, 152 Mont. 526, 451 P.2d 833 (1969)

Montana Power Company sought to condemn land owned by Bokma for the purpose of erecting an electric power transmission line. The District Court ruled in favor of Montana Power Company, and the Supreme Court affirmed the ruling. This case is similar to Spratt in that the landowner questioned whether or not the proposed use was public if the reason for the transmission line was to serve one customer.

The Court expanded the interpretation found in Spratt by stating:

> Thus, in Montana a public use is one which confers some benefit or advantage to the public. Such public use is not confined to actual use by the public, but is measured in terms of the right of the public to use the proposed facilities for which condemnation is sought. As long as the public has the right of use, whether exercised by one or many members of the public, a "public advantage" or "public benefit" accrues sufficient to constitute a public use.

In addition to addressing a number of other issues, including necessity, authority of the condemnor, and condemnor discretion, this case also entertained the issue of due process rights. The landowner argued that the process that the District Court utilized to decide the outcome of this case was in violation of the Due Process provision of the Montana Constitution. The Supreme Court, relying on several previous cases, concluded that in order for a condemnation action to infringe upon a landowner's due process rights, the error must be "gross and obvious" and that the constitution is not violated unless there is an "absolute disregard" of the right of the landowner to be justly compensated for the taking.

In each of these cases, courts addressed questions regarding the condemnor's authority to take land for a public purpose authorized by law. In doing so, the courts established the role of the judiciary by offering a definition of their own boundaries in light of common principles associated with where the power and authority of eminent domain resides. The definition of "public use" has been the subject of numerous condemnation cases. While the judiciary has offered dozens of interpretations, it has repeatedly argued that the power of eminent domain is vested exclusively in the Legislature and can be exercised only by the Legislature and any other entities to which the Legislature has seen fit to delegate this power. This includes the delineation of activities that affirm the public use philosophy.

Recent Montana Court Cases

Cenex Pipeline LLC. v. Fly Creek Angus, Inc., 1998 MT 334, 292 Mont. 300, 971 P.2d 781 (1998).

Cenex Pipeline filed a complaint in the Yellowstone County District Court for the condemnation of a right-of-way over property owned by the defendant Fly Creek Angus, Inc. The District Court issued an order allowing the condemnation for a permanent pipeline and fiber-optic line as well as a right of access and a temporary construction easement. The Supreme Court affirmed the judgment of the District Court. There were no dissenting opinions.

In this case, Fly Creek presented six issues on appeal to the Supreme Court.

- The condemnation did not provide for the specific identification of the access right-of-way.
- The condemnation of a 50-foot easement amounted to an excessive taking.
- The condemnation for a fiber-optic line was not addressed in the condemnation complaint.
- The action of Cenex was arbitrary and capricious.
- The condemnation over the route proposed by Cenex, rather than over Fisher's property, as suggested by Fly Creek, was inappropriate.
- The complaint for condemnation proceeded without prior proof of an environmental assessment

Cenex owns a pipeline that transports fuel between Laurel and Glendive. Cenex sought to replace 76 miles of the aging pipeline between Billings and Hysham and in the process, shift the location of the pipeline from its current location in the Yellowstone River Valley to drier and less populated land. To accomplish these goals, Cenex developed a new route that crossed the land of approximately 35 landowners, including the land owned and operated by Fly Creek.

The initial route Cenex proposed was the result of in-depth conversations with affected landowners who assisted Cenex representatives in identifying obstacles that could impact the precise location of the new pipeline. After several consultations with Fly Creek, Cenex made a number of modifications to the proposed route to address additional suggestions. Negotiations with landowners commenced, and Cenex eventually reached an agreement regarding compensation for the proposed right-of-way with everyone but the representatives of Fly Creek.

During this same period, the Department of Environmental Quality (DEQ) was developing an environmental assessment of the proposed route. After addressing a number of route variations offered by Fly Creek, including a proposal to reroute the pipeline across adjacent private land, Cenex successfully negotiated a right-of-way with the adjacent owners, but still failed to reach an agreeable settlement with Fly Creek. At a public hearing after the new changes were accepted by Cenex, Fly Creek proposed another change that included rerouting the pipeline across land owned by Stan Fisher. Fly Creek representatives did not discuss the change with Fisher, but did communicate the proposal to environmental assessment professionals who, at the time, did not conduct an investigation of the Fisher property. Failing to reach an agreement with Fly Creek on any of the routes, Cenex filed a condemnation complaint with the District Court. The complaint was filed in accordance with section 70-30-111, MCA, demonstrating that the use was authorized by law, that the taking was necessary to the use, and that an effort had been made to obtain the interest and the offer had been rejected.

Following the filing of the condemnation complaint, the DEQ published its environmental assessment that stated it "slightly preferred" the Fisher route to the route proposed by Cenex. During the required public comment period, neither Cenex nor Fisher submitted a response. However, the record showed that Fisher and Cenex had discussed routing the pipeline across Fisher's land but that Fisher expressed his concern about the route by stating that the terrain created obstacles to construction and he was not interested in offering Cenex a right-of-way. Cenex apparently agreed and did not seriously consider the Fisher route as a viable option.

After the public comment period ended, the DEQ issued a final determination. The DEQ stated that an environmental impact statement was unnecessary and that of the three routes examined, all could receive the appropriate state permits. The DEQ also stated that the public comments suggested that the route proposed by Cenex be supplemented by the Fly Creek proposal (across the Fisher land) and that change was "slightly preferred to the proposed route". Cenex obtained the necessary permits to begin construction of the pipeline along its proposed route. The District Court found that it was in the public's best interest that the pipeline be moved from its existing location and that the proposed route provided the greatest public good with the least private injury. The Court ordered the taking of the Fly Creek property.

The first issue was whether the District Court erred in allowing Cenex to move forward with the condemnation without specific identification of the access right-of-way. Fly Creek contended that Cenex did not properly identify the access right-of-way when it filed the condemnation complaint. Cenex claimed that by not specifically identifying distinct access points, it was attempting to ease the pressure on the land in question to ensure that the condemnation resulted in the least amount of private injury. The Supreme Court stated that the identification of an access right-of-way was as accurate and as specific as it could or needed to be. The question was whether Cenex complied with the specific statutory reference regarding the condemnation complaint, in this case section 70-30-203(5), MCA, requiring that the condemner must show the location and general route of the desired right-of-way. The Court concluded that it did comply and did so under the restrictions found in

section 70-30-203(6), MCA, requiring that the interest sought is the minimum necessary interest.

The second issue goes to whether the condemnation of a 50-foot easement is excessive. Fly Creek argued that Cenex failed to demonstrate that the interest sought is the minimum necessary interest, as required by section 70-30-203(6), MCA. Cenex, through its successful negotiations with other landowners along the proposed route, acquired up to a 50-foot easement. Even though some negotiations resulted in less than a 50-foot easement, provisions were added to the agreements between Cenex and private landholders to allow for at least a 50-foot easement. The Supreme Court ruled that the District Court did not err in allowing the condemnation on this issue.

The third issue addressed whether or not the District Court erred in allowing the condemnation of the land in question for the laying of a fiber-optic line. Under section 69-13-103, MCA, a common carrier pipeline, such as Cenex, has the right to lay telecommunications lines along a pipeline if the telecommunications lines are designed to be used in connection with the operation of the pipeline. The issue raised by Fly Creek was that Cenex had, at one point, stated that they were not planning on laying a fiber-optic cable to be used in conjunction with the pipeline. The Supreme Court upheld the District Court decision by looking at the full context of the project, including the fact that the possibility of installing fiber-optic cable "may be considered prior to actual construction". Given that, the Supreme Court ruled that the condemnation was valid on this issue.

The fourth issue revolved around whether the route proposed by Cenex and the resulting condemnation of the property was arbitrary and capricious. The Supreme Court relied on the evidence that was offered demonstrating the fact that Cenex worked at length with the landowners along the proposed route. The burden to prove Cenex acted in an arbitrary and capricious manner fell on the landowner. The Court determined that since the other impacted landowners were contacted regarding the pipeline proposal and all had reached a financial agreement relative to the necessary land, Fly Creek failed to prove that Cenex's action was arbitrary or capricious.

The fifth issue was whether the District Court erred in allowing the condemnation over the Fly Creek property rather than over the alternative route proposed. Fly Creek contended that since the DEQ's environmental assessment "slightly preferred" the Fisher route, Cenex was bound by the DEQ's assessment. The Court stated that given the DEQ's own determination that the statutes did not provide the substantive authority to require construction of one route over another, the condemnation was appropriate.

The final issue considers whether the District Court erred in allowing the condemnation to proceed without prior proof of an environmental assessment. Fly Creek claimed that Cenex could not prove the necessary elements of the condemnation given the fact that Cenex had initiated the condemnation complaint before the DEQ had completed the final version of the environmental assessment. The Supreme Court, relying on a ruling issued in Schara v. Anaconda Company, 187 Mont. 377, 610 P.2d 132 (1980), stated that nothing in either the environmental or eminent domain statutes requires an authorized party to

"obtain a valid permit prior to condemnation", and that to do so "would be inconsistent with Montana statutory authority and . . . contrary to the public policy of providing expediency in eminent domain proceedings". On this issue, the Supreme Court determined that the condemnation was valid.

This case represents the most recent eminent domain case to appear before the Montana Supreme Court. The Cenex decision portrays a number of concepts important to developing a solid understanding of the eminent domain process. The issues raised in the case provide a starting point for subsequent legislative investigation into the purposes and processes of condemnations.

Conclusion

The power and authority to condemn land does not originate from a constitutional or statutory provision. This power is inherent in all sovereign governments and, if not checked by constitutional and statutory provisions, is limitless. Reference to eminent domain in Title 70, chapter 30, of the Montana Code Annotated and Article II of the Montana Constitution is Montana's method of protecting the rights of Montana property owners as well as providing for the general public benefit expected by every citizen.

Each of the cases identified in this chapter, along with dozens of others that were not mentioned, offers the following broad generalizations. First, private property can be condemned, often by a wide variety of entities, as long as those entities are first given that authority by the legislative body. Second, private property may be taken for public purposes, a concept that has multiple meanings, so long as just compensation is provided to the private property owner. Third, private property owners are offered statutory protection from the arbitrary and capricious condemnation of property under principles of necessity and greatest public good with the least private injury. Finally, these cases provide a glimpse into the judiciary's interpretation of laws designed to protect the public. The courts have defined concepts governing public use, due process, necessity, and just compensation. They have also demonstrated their respect for legislative authority by recognizing and upholding the understanding that eminent domain is under control of the legislative body.

The often arcane language and concepts of eminent domain provide an interesting backdrop to Montana history. Central to the evolution of the eminent domain statutes was the knowledge that condemning private property for public uses still required compensation, still required a legitimate purpose, and still required adequate protections for private property rights.

REFERENCES

1. Nichols on Eminent Domain, Revised 3rd Ed., Section 1.11, J. Sackman, 1999.

2. Pollard v. Hagan, 3 How. 212, 11 L. Ed. 565; Western Union Tel. Co. v. Louisville & N.R. Co., 110 N.E. 583; *in re* Forsstrom, 38 P.2d 878; Filbin Corp. v. United States, 265 F. 354; Griffith v. Southern Ry. Co., 131 S.E. 413.

3. Nichols on Eminent Domain, Revised 3rd Ed., Section 1.12[1], J. Sackman, 1999.

4. *Ibid*, Section 1.14[2].

5. *Ibid*, Section 1.141[3].

6. Law of Property Rights Protection: Limitations on Governmental Powers, Section 8.01[A], Jan G. Laitos, Aspen Law & Business, 1999.

7. Nichols on Eminent Domain, Revised 3rd Ed., Sections 1.24[5] and 1.3, J. Sackman, 1999.

8. Hughes v. United States, 230 U.S. 24 (1913).

9. Chappell v. United States, 160 U.S. 499 (1896); Kozicki v. City of Crown Point, 560 F. Supp. 1203 (N.D. Ind. 1983); Concerned Citizens United, Inc. v. Kansas Power and Light Co., 523 P.2d 755 (Kan.1974); 1A Nichols on Eminent Domain, Revised 3rd Ed., Section 3.01[2], J. Sackman, 1999.

10. Section 70-30-102, MCA. In other titles of the MCA, the Legislature has granted the specific eminent domain authority to certain private industries and corporations. An example is found in section 69-13-104, MCA, addressing common carrier pipelines.

11. **Colorado**: ARTICLE II; Bill of Rights, Section 14. Taking private property for private use. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and except for reservoirs, drains, flumes or ditches on or across the lands of others, for agricultural, mining, milling, domestic or sanitary purposes. **Idaho**: Article I Declarations of Rights, Section 14. RIGHT OF EMINENT DOMAIN. The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state. Private property may be taken for public use, but not until a just compensation, to be ascertained in the manner prescribed by law, shall be paid therefor. **Wyoming**: 97-1-032. Eminent domain. Private property shall not be taken for private use unless by consent of the owner, except for private ways of necessity, and for reservoirs, drains, flumes or ditches on or across the lands of others for agricultural, mining, milling, domestic or sanitary purposes, nor in any case without due compensation.

12. Rev. Stat. Utah 1898, 1278.

13. Nichols on Eminent Domain, Revised 3rd Ed., Sections 1.11-1.14, J. Sackman, 1999.

14. Revised Statutes of MT; Code of Civil Procedure, sec. 579 (1879), and Compiled Statutes of Montana, Code of Civil Procedure, sec. 597 (1887).

15. Montana Constitutional Convention 1971-72, Verbatim Transcripts, Vol. VI, pp. 1825-1828.

16. Section 70-30-111, MCA, requires that before property may be taken, the condemnor must show that the public interest requires the taking based on the following findings: (1) the use is authorized by law; (2) the taking is necessary to the use; (3) if already a public use, the proposed use is a more necessary use; and (4) the condemnor sought to obtain the property by submitting an offer that was refused.

17. State ex rel. St. Highway Comm'n v. District Court, 107 Mont. 126, 81 P.2d 347(1938).

18. The court stated that if indeed the three proposed routes were equal and that the public would be equally well-served by any of the proposed routes, the appropriate route would come down to the least private injury.

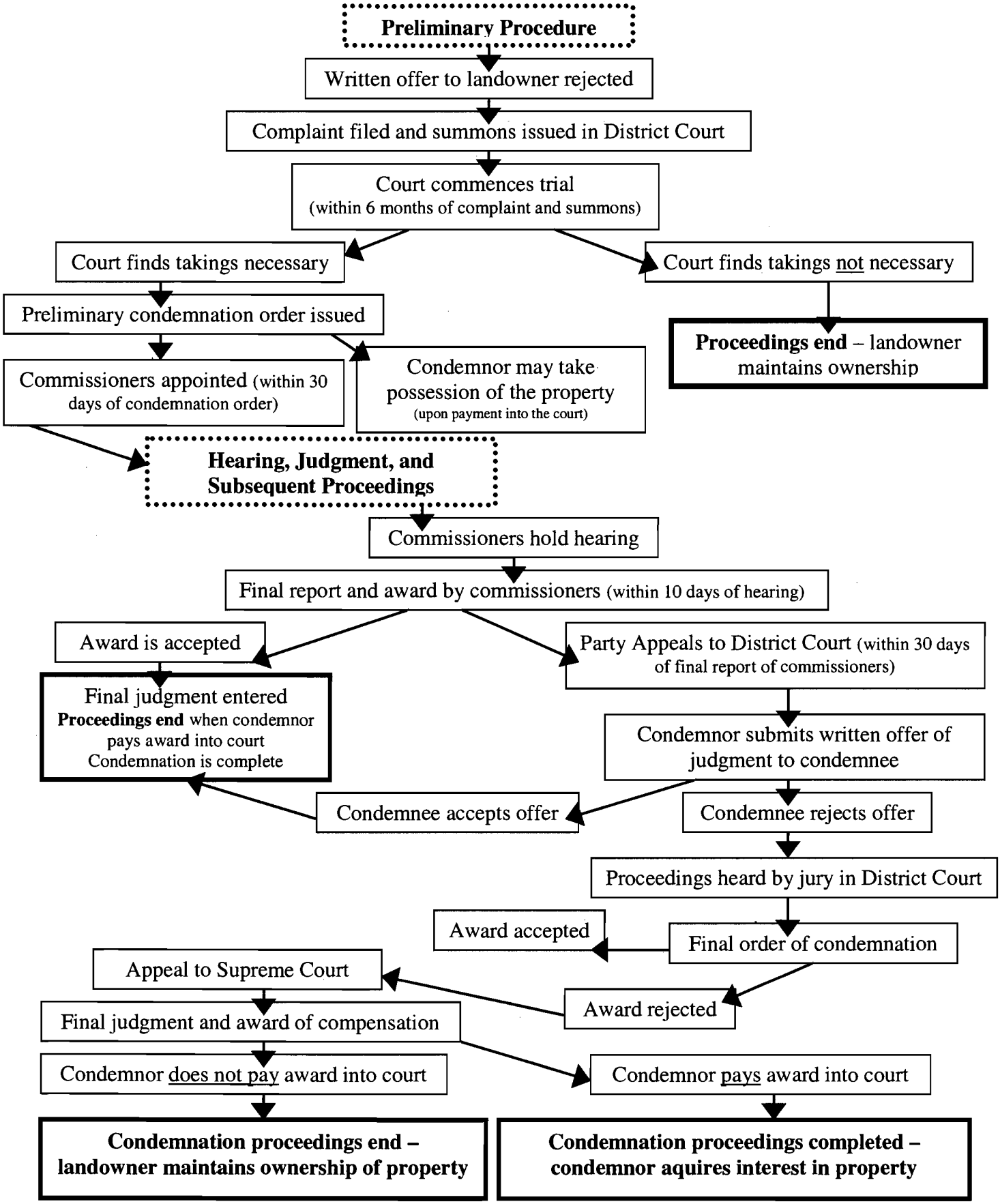
19. The section referred to has been recodified as 70-30-206, MCA. The section outlines the substance of the powers of the court; however, the specific language was changed in 1983.

EMINENT DOMAIN IN THE PRESENT

Chapter 3: What is Eminent Domain and How is Eminent Domain Exercised?

What is the Process of Exercising Eminent Domain?

Figure 3. Process for Condemnation Under Eminent Domain Laws



FEDERAL/STATE RELATIONSHIPS

The State's Level of Concurrence on Federal Projects

Eminent domain is a power held by the states as well as the federal government. The Subcommittee felt that an important facet of understanding the big picture of eminent domain was to understand how Montana interacts with the United States government on federal eminent domain actions, if at all.

Prior to Kohl v. United States, 91 U.S. 367 (1875), the federal government relied upon the individual states or territories to act as its agent in condemnation actions. In Kohl, the United States Supreme Court ruled that the federal government could exercise eminent domain on its own behalf under the Fifth Amendment to the United States Constitution. After this decision, the federal government did not have to rely on the individual states to exercise the right of eminent domain. This ruling shows that the federal government does not have to interact with or have agreement from the state on condemnation actions. It can exercise the right on its own and in the manner it sees fit, provided that the condemnation is for a public use and the property owner receives just compensation.

For the federal government to condemn land, Congress must pass a bill identifying the property that is to be acquired. Within that bill, the type of acquisition would have to specify that condemnation may be one of the methods used to acquire the property.

In Montana, the public uses for which eminent domain may be exercised, as determined by the Legislature, are enumerated in 70-30-102, MCA. A majority of the states, if not all, follow this same process of enumerating the public uses in state statute. At the federal level, the public uses are not delineated in a separate section of law relating specifically to eminent domain. Each time private lands have been taken for a public use at the federal level, Congress has passed a law stating the exact purpose of the condemnation. For example, to establish the Everglades National Park, Congress passed a bill specifying how the property (within a boundary specified in the law) could be acquired for the purpose of protecting the Everglades.

The federal government can condemn land if the following occurs:

- Congress passes a bill delineating the property to be acquired.
- Within that bill, the acquisition language specifically states that condemnation may be used or the word "otherwise" is used to identify acquisition methods that may be used to acquire the property.
- Congress appropriates money for the payment of just compensation to the condemnee.

Comparison of Eminent Domain Statutes in Montana and Other Western States

In an effort to examine and compare Montana's eminent domain law to eminent domain laws in other states in the West, the primary eminent domain statutes for nine western states were reviewed. The states from which information was gathered were: Colorado, Idaho, Nevada, North Dakota, Oregon, South Dakota, Washington, Wyoming, and Utah. These states were chosen because of their location in relation to Montana and because many of the issues that they face are similar to those faced in Montana, such as large land area, sparse population, increase in development pressure, and the types of industries located in those states.

With education and understanding as the goal, the Subcommittee requested that information on the following two questions be provided to the Subcommittee for review.

(1) What differences, if any, are there between these other states' laws and Montana's laws?

(2) Has there been recent legislation (in the last 2 years) regarding eminent domain?

In general, the laws are very similar with various portions that are more specific or less specific. The states that were reviewed have their statutes set up the same way that Montana does. The actual eminent domain law is located in one section with other sections of law giving the authority to a specific entity for a specific purpose.

With regard to legislation, there were three states that had bills introduced relating to eminent domain in their last session. Each of the states had one bill pass among numerous bills introduced.

Chapter 4: Legal Concepts Inherent to Eminent Domain

Because eminent domain is a specific legal procedure that is constitutionally based, a number of legal concepts were required to be considered and understood. An analysis of the process to determine if recommendations for changes to eminent domain law were desirable could not be completed until the legal concepts involved in the procedure were understood. This chapter will discuss eight specific legal concepts that were considered. The different legal concepts are intertwined in some instances and stand alone in others. Both the interpretation and use of the concepts by the Montana Supreme Court are discussed when that discussion will assist in understanding the concept.

Public Uses Enumerated

The first step prior to commencing an eminent domain proceeding is to determine if the proposed project or activity is a public use. In Montana, the determination of whether a project or activity qualifies as a public use is the sole responsibility of the Legislature. Therefore, a specific statutory reference declaring a proposed project or activity to be a public use must be found in order to even contemplate an eminent domain condemnation action. Section 70-30-111(1), MCA, requires the party proposing to exercise the power of eminent domain to show that the use for which the property is proposed to be taken is a use authorized by law. Section 70-30-102, MCA, contains a list of public uses, and other statutes authorize the exercise of the power of eminent domain for specific uses. By citing the appropriate statutory reference and introducing evidence to show that the proposed project or activity falls within the cited statute, the party proposing to exercise the power of eminent domain shows that the use is authorized by law.

> In Montana, the Legislature has sole responsibility for determining whether a project or activity qualifies as a public use.

There are 44 specific statutory enumerations of public uses in the Montana Code Annotated. Section 70-30-102, MCA, authorizes the following public uses:

(1) all public uses authorized by the government of the United States;

(2) public buildings and grounds for the use of the state and all other public uses authorized by the Legislature of the state;

(3) public buildings and grounds for the use of any county, city, town, or school district;

(4) canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town;

(5) projects to raise the banks of streams, remove obstructions from streambanks, and widen, deepen, or straighten stream channels;

(6) roads, streets, alleys, controlled-access facilities, and all other public uses for the benefit of any a county, city, or town or the inhabitants of a county, city, or town;

(7) wharves, docks, piers, chutes, booms, ferries, bridges, private roads, plank and

turnpike roads, and railroads;

(8) canals, ditches, flumes, aqueducts, and pipes for:

(a) supplying mines, mills, and smelters for the reduction of ores;

(b) supplying farming neighborhoods with water and drainage;

(c) reclaiming lands; and

(d) floating logs and lumber on streams that are not navigable;

(9) sites for reservoirs necessary for collecting and storing water. However, reservoir sites must possess a public use demonstrable to the District Court as the highest and best use of the land.

(10) roads, tunnels, and dumping places for working mines, mills, or smelters for the reduction of ores;

(11) outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and smelters for the reduction of ores;

(12) an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores and sites for reservoirs necessary for collecting and storing water for the mines, mills, or smelters. However, the reservoir sites must possess a public use demonstrable to the District Court as the highest and best use of the land.

(13) private roads leading from highways to residences or farms;

(14) telephone or electrical energy lines;

(15) telegraph lines;

(16) sewerage of any:

(a) county, city, or town or any subdivision of a county, city, or town, whether incorporated or unincorporated;

(b) settlement consisting of not less than 10 families; or

(c) public buildings belonging to the state or to any college or university;

(17) tramway lines;

(18) logging railways;

(19) temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways for a time that the court or judge may determine. However, the grounds of state institutions may not be used for this purpose.

(20) underground reservoirs suitable for storage of natural gas;

(21) projects to mine and extract ores, metals, or minerals owned by the condemnor located beneath or upon the surface of property where the title to the surface vests in others. However, the use of the surface of property for strip mining or open-pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use, and eminent domain may not be exercised for this purpose.

(22) projects to restore and reclaim lands that were strip mined or underground mined for coal and not reclaimed in accordance with Title 82, chapter 4, part 2, and to abate or control adverse affects of strip or underground mining on those lands.

In addition to the public uses listed in section 70-30-102, MCA, the following specific public uses are also statutorily authorized:

(1) water and water supply systems as provided in Title 7, chapter 13, part 44, MCA;

(2) acquisition of road-building material as provided in 7-14-2123, MCA;

(3) stock lanes as provided in 7-14-2621, MCA;

(4) parking areas as provided in 7-14-4501 and 7-14-4622, MCA;

(5) airport and landing field purposes as provided in 7-14-4801, 67-2-301, 67-5-202, 67-6-301, and Title 67, chapters 10 and 11, MCA;

(6) urban renewal projects as provided in Title 7, chapter 15, parts 42 and 43, MCA

(7) housing authority purposes as provided in Title 7, chapter 15, part 44, MCA;

(8) county recreational and cultural purposes as provided in 7-16-2105, MCA;

(9) city or town athletic fields and civic stadiums as provided in 7-16-4106, MCA;

(10) county cemetery purposes as provided in 7-35-2201 and cemetery association purposes as provided in 35-20-104, MCA;

(11) preservation of historical or archaeological sites as provided in 23-1-102 and 87-1-209(2), MCA;

(12) public assistance purposes as provided in 53-2-201, MCA;

(13) common carrier pipelines as provided in 69-13-104, MCA;

(14) water supply, water transportation, and water treatment systems as provided in 75-6-313, MCA;

(15) mitigation of the release or threatened release of a hazardous or deleterious substance as provided in 75-10-720, MCA;

(16) the acquisition of nonconforming outdoor advertising as provided in 75-15-123, MCA;

(17) screening for or the relocation or removal of junkyards, motor vehicle graveyards, motor vehicle wrecking facilities, garbage dumps, and sanitary landfills as provided in 75-15-223, MCA;

(18) water conservation and flood control projects as provided in 76-5-1108, MCA;

(19) acquisition of natural areas as provided in 76-12-108, MCA;

(20) acquisition of water rights for the natural flow of water as provided in 85-1-204, MCA;

(21) property and water rights necessary for waterworks as provided in 85-1-209 and 85-7-1904, MCA; and

(22) conservancy district purposes as provided in 85-9-410, MCA.

Due Process Considerations in Eminent Domain Proceedings

Due process is the conduct of legal proceedings according to the established rules and principles for the protection and enforcement of private rights. The Due Process Clauses of the 5th and 14th Amendments to the United States Constitution guarantee the rights of all citizens.

The 5th Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in

> time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.* (emphasis added)

The 14th Amendment to the United States Constitution expands the rights guaranteed in the 5th Amendment by applying due process rights to the individual states. It provides in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any state deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

Article II, section 17, of the Montana Constitution echoes the U.S. Constitution's treatment of due process by providing that "No person shall be deprived of life, liberty, or property without due process of law". Article II, section 29, limits the state's right to exercise eminent domain. It provides:

> Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having first been made to or paid into court for the owner. In the event of litigation, just compensation shall include necessary expenses of litigation to be awarded by the court when the private property owner prevails.

There are two varieties of due process--substantive due process, which is the doctrine that requires legislation to be fair and reasonable in content and to further a legitimate governmental objective, and procedural due process, which includes the minimal requirements of notice and an opportunity for a hearing, especially if the deprivation of a significant life, liberty, or property interest may occur.

Discussing due process as it relates to eminent domain includes both the substantive and procedural descriptions. Under the definition of procedural due process, several Montana statutes outline the procedure that entities authorized to exercise eminent domain must follow to ensure that the due process rights of the affected property owner are protected.

During eminent domain proceedings, both procedural and substantive due process rights are considered by the judiciary, often simultaneously. In essence, the state may not, lest it violate an individual's substantive due process rights, unfairly or unreasonably pass laws that fail to further a legitimate governmental interest. The establishment of those actions that are appropriate for the public's benefit must be balanced by the potential harm caused to a private property owner subject to eminent domain proceedings. Procedural due

process rights are protected under the requirement that a notice must be filed and that, at a minimum, each party has the opportunity to participate in the judicial process.

Procedural Due Process

Section 70-30-110, MCA, begins the eminent domain notification process by requiring that an entity authorized to use eminent domain notify the property owner of the entity's intent to locate and survey private land necessary for the completion of a project. Following 30 days' written notice, the authorized parties may enter the land and begin their assessment.

THE LAW REQUIRES THAT A FAIR AND OPEN HEARING BE GRANTED BEFORE PROPERTY CAN BE TAKEN FOR PUBLIC USE.

Before property can be taken, the condemnor must demonstrate that the public interest requires the taking as provided in section 70-30-111, MCA. That section requires the condemnor to show that it has attempted to acquire the property through negotiation. That requirement further protects the procedural due process rights of the landowner. While the process defining how the condemnor must engage in the negotiations process is not stated within the statutes, the District Court may not issue a preliminary condemnation order until the court is satisfied that the condemnor has met its burden of proof.

Sections 70-30-110 and 70-30-111, MCA, are intended to satisfy the notification requirement fostered by due process guarantees. The requirement that a fair and open hearing is granted before private property may be taken for a public use is contained in Title 70, chapter 30, part 2, MCA, and sections 70-30-301 through 70-30-312, MCA.

Section 70-30-202, MCA, provides that both the condemnor and the condemnee are notified of the impending judicial proceedings to determine whether a preliminary condemnation order can be issued. Within 6 months of the notification, the court, sitting without a jury, commences a trial.

If the court determines that the condemnation complaint warrants the issuance of a preliminary condemnation order, the defendant must make a claim for just compensation. Section 70-30-207, MCA, provides that if the plaintiff rejects the defendant's claim, the District Court must appoint three condemnation commissioners who will make a determination as to the value of the land proposed to be taken.

With the judge presiding, the commissioners hear testimony of the condemnee and condemnor, as provided in 70-30-301, MCA. If either party appeals an assessment as determined by the commissioners, that determination is appealed to the District Court and heard before a jury. Finally, if after the final condemnation order is issued, either party wishes to appeal to the Supreme Court, they may do so as provided in section 70-30-312, MCA.

Substantive Due Process

Substantive due process relates to eminent domain in the same manner that it relates to other state actions. In each case, the state must craft legislation or pursue policy decisions that further a legitimate governmental objective. Applying this component of due process to eminent domain actions suggests that laws governing the types of uses considered to be in the public's best interest, the designation of nongovernmental entities authorized to exercise eminent domain, and the establishment of laws providing just compensation must provide for the greatest public good with the least private injury.

The power to condemn private property for public uses is an inherent power of sovereign governments. Like the ability to police or tax citizens, condemning private property must result in an action that promotes a benefit to the general public. The Fifth Amendment to the United States Constitution and Article II, section 29, of the Montana Constitution limit the government's ability to condemn private property without regard to individual rights.

The responsibility for determining which legitimate governmental objectives should be furthered falls to the legislative body. The Legislature has provided a description of what it considers to be legitimate governmental actions that could be fostered through the use of eminent domain. Though the list of public uses in section 70-30-102, MCA, reflects the historical period in which the Legislature made its decisions, the vast majority of the western states, as well as the rest of the country, include these uses within their own constitutions or statutes.

Necessity and Public Interest in Eminent Domain Proceedings

This part will discuss how *necessity* and *public interest* are determined in eminent domain proceedings. Neither of these terms is specifically defined in Title 70, chapter 30, MCA, governing eminent domain. Both terms are referred to in section 70-30-111, MCA. That section enumerates the items on which the condemnor must introduce evidence in order to be allowed to exercise the power of eminent domain to take property.

Section 70-30-111, MCA, provides that before property can be taken by eminent domain, the condemnor must show, by a preponderance of the evidence, that the *public interest* requires the taking based on the following:

(1) that the use is authorized by law;

(2) that the taking is *necessary* for the use;

(3) if already appropriated to a public use, that the proposed public use is a *more necessary* public use; and

(4) that an effort was made to obtain the property sought to be taken by a written offer that was refused by the property owner.

The requirement of section 70-30-111(1), MCA, is easily met by introducing evidence that the type of project is a public use listed in section 70-30-102, MCA, or is specifically

designated as a public use in another statute. The requirement of section 70-30-111(4), MCA, is easily met by introducing into evidence a written document in which an offer to buy the property or interest in property is made. The rejection of the offer is easily established by either a written document or testimony. The requirements of subsections (1) and (4) of section 70-30-111, MCA, are required to be established in every eminent domain proceeding and are so straightforward that they are virtually beyond reasonable dispute. The other element that is required to be established in every eminent domain proceeding in that the taking of the property or the interest in property is *necessary* for the statutorily determined public use. That requirement, contained in section 70-30-111(2), MCA, is the item that is almost always subject to dispute. The element contained in section 70-30-111(3), MCA, is not required to be established in every eminent domain proceeding. It is only required to be established if the property or interest in property is already being used for a statutorily authorized public use. If the property is already being used for a public use, then the condemnor is required to establish that the proposed public use is *more necessary* than the existing public use.

Because the determination of whether the taking of the property or the interest in property is *necessary* for the statutorily determined public use is not as susceptible to easy determination as the other required elements of section 70-30-111, MCA, it has been subject to a great deal of litigation. There has not been a great deal of litigation concerning whether a proposed taking of property is in the *public interest*. The explanation for the lack of litigation concerning the *public interest* issue is contained in the language of section 70-30-111, MCA. That section provides that the *public interest* is established by introducing sufficient evidence on the three required items, only one of which, *necessity*, is usually even susceptible to dispute. However, section 70-30-206(2), MCA, provides that if the District Court judge hearing a condemnation case concludes, based upon the evidence presented, that the *public interest* requires the taking of the property and that the condemnor has met the burden of proof under section 70-30-111, MCA, the judge shall enter a preliminary condemnation order allowing the condemnation to proceed. The additional *public interest* requirement contained in section 70-30-206(2), MCA, will be discussed later in this part. The other section that is the subject of dispute in eminent domain proceedings is section 70-30-110, MCA. That section requires that the District Court must also determine whether a proposed condemnation is located in the manner that will be most compatible with the greatest public good and the least private injury. That question is almost always a siting or location issue that arises after a taking of property has been found *necessary* for a specific public use.

An examination of a series of cases may prove useful in order to demonstrate how the determination of *necessity* is made. The terms *necessary* and *necessity* are used for the same specific concept. The case of Montana Power Company v. Bokma, 153 Mont. 390, 457 P.2d 769 (1969), involving the taking of property for an electric power line, contains a good general overview of potential issues in eminent domain proceedings. Bokma contains a discussion of public use, the *necessity* for a taking, how the issue of greatest public good and least private injury is addressed, and due process.

While the Legislature is solely responsible for determining whether a use is a *public use* and is therefore authorized by law, the Judicial Branch, as provided in sections 70-30-111 and 70-30-206(2), MCA, is responsible for determining the issues of whether a taking is *necessary* and in the *public interest.* The Montana Supreme Court has construed the District Court's role under section 70-30-111, MCA, as that of finding whether or not the proposed taking is *necessary* to the public use under the circumstances of the individual case. Bokma. In State Highway Commission v. Crossen-Nissen Company, 145 Mont. 251, 400 P.2d 283 (1965), the Court rephrased the District Court's role as that of determining whether the particular property to be taken is reasonably requisite and proper for the accomplishment of the purpose for which the property is sought under the particular circumstances of each case. That rephrased role is based upon a long series of cases.

THE JUDICIAL BRANCH IS RESPONSIBLE FOR DETERMINING WHETHER A TAKING IS NECESSARY AND IN THE PUBLIC INTEREST.

One of the earliest and best discussions of the concept of *necessity* was contained in a case in which a railroad was seeking to condemn land for a spur line. In Northern Pacific Railway Company v. McAdow, 44 Mont. 547, 121 P. 473 (1912), Chief Justice Brantly determined that the term *necessary* is used advisedly. The Chief Justice discussed the holding in Butte, Anaconda & Pacific Railway Company v. The Montana Union Railway Company, 16 Mont. 504 (1895), in which the Montana Supreme Court adopted a *necessity* test from Alabama and rejected an *absolute necessity* test adopted in Pennsylvania. The Alabama test provided that the term does not mean that there is an absolute or indispensable *necessity.* Chief Justice Brantly reaffirmed the Butte, Anaconda & Pacific determination that, generally, *necessary* means reasonable, requisite, and proper for the accomplishment of the end in view under the particular circumstances of the case. The fact that the taking of a particular piece of property would promote convenience and enhance the profits of the business of the railroad company was not alone a sufficient reason for permitting a taking. Convenience, economy, expedition, and *necessity* for facilities for competition may be inducing considerations because they all contribute indirectly to efficient service, but a corporation may not condemn property on the sole grounds that it may save expenses or add to the profits of the business. The determination that *necessary* means reasonable, requisite, and proper for the accomplishment of the end in view under the particular circumstances of the case has been scrupulously followed by the Montana courts.

Although the phrase "reasonable, requisite, and proper" has not been defined, the plain meaning of the phrase indicates that the condemnor is required to introduce evidence showing that the proposed taking is sensible, is required by the specific circumstances of the proposed project, and is suitable to the specific purpose or specific conditions of the project. With that explanation of *necessity* in mind, this part will examine how the evidentiary determination has been made in specific instances.

In City of Missoula v. Mountain Water Company, 228 Mont. 404, 743 P.2d 590 (1987), the City attempted to take a water supply and a privately owned water system by eminent domain. The City passed an ordinance and a resolution authorizing the taking of the water supply and water system. The City contended that the *necessity* for the taking was conclusively presumed based upon the ordinance and resolution. The District Court disagreed, and the Supreme Court upheld the District Court. The Supreme Court reaffirmed that *necessary* as used in section 70-30-111, MCA, means a reasonable, requisite, and proper means to accomplish the improvement. The Supreme Court relied on State ex rel. Smart v. City of Big Timber, 165 Mont. 328, 528 P.2d 688 (1974), to illustrate the wide range of considerations that are used in determining whether a proposed public use is more necessary than the present use. The District Court made detailed findings listing the reasons for concluding that the City did not prove that it was *necessary* to acquire the water system. The findings included the effect on Mountain Water employees, the effect on public savings on rates and charges, the effect on cooperation between the City and the company, and the effect of having the company's home office in Missoula. The Supreme Court found that the District Court had erred in excluding evidence concerning profit, the out-of-state ownership of Mountain Water, and the votes of the people and the City Council. The Supreme Court determined that the evidence concerning private versus public ownership was pertinent to determining whether the *public interest* required the taking under section 70-30-111, MCA, as broadly drafted and defined. The Supreme Court held that because section 70-30-111, MCA, gives the District Court the power to determine whether a taking is *necessary*, the votes by the people and the City Council could not be finally dispositive of the issue of *necessity*. The Supreme Court determined that the votes had to be considered and weighed with other factors in determining the *necessity* of the taking. The Supreme Court expressed regret that section 70-30-111, MCA, does not set forth all of the issues that are appropriate for consideration on the *necessity* for a taking or the weight to be given to the various factors. The Supreme Court did point out that the City has the burden of proving that the taking was *necessary* by a preponderance of the evidence. On remand, the District Court again concluded that the City had failed to prove the *necessity* for the taking. In a second appeal, in City of Missoula v. Mountain Water Company, 236 Mont. 442, 771 P.2d 103 (1989), the Supreme Court upheld the District Court determination. In that case, many additional offers of evidence by the City were precluded by the law of the case.

In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 Mont. 235, 696 P.2d 989 (1985), concerning an attempt to extend a sewer system, the Montana Supreme Court reconciled the holdings in City of Helena v. DeWolf, 162 Mont. 57, 508 P.2d 122 (1973), and State Highway Commission v. Yost Farm Company, 142 Mont. 239, 384 P.2d 277 (1963). The Supreme Court stated that once the condemnor has introduced sufficient evidence to establish *necessity*, the burden shifts to the person opposing the taking to show by clear and convincing evidence that the condemnor's action is excessive or arbitrary. In Bossing, the condemnor failed to show *necessity* because the condemnor failed to establish a reasonable present need or even a need in the reasonably foreseeable future to connect Bossing to the sewer project. The Court also provided an example involving an improvement. When the location of an improvement is chosen based on the expertise and detailed consideration of the condemnor and evidence concerning that

consideration is introduced at the hearing, the condemnor's choice may be overturned if the opposing party shows that the condemnor failed to consider the least private injury between routes that are equal in terms of public good.

In certain instances, the Legislature has granted another governmental entity the power of determining the *necessity* for the exercise of the power of eminent domain. In those instances, the finding is a political decision that will not be overturned by the court absent proof of arbitrariness established by clear and convincing evidence. See Montana Power Company v. Fondren, 226 Mont. 500, 737 P.2d 1138 (1987), and City of Bozeman v. Vaniman, 264 Mont. 76, 869 P.2d 790 (1993).

Section 60-4-103, MCA, provides for a showing similar to that required in section 70-30-111, MCA, for a state highway project. However, once the Department of Transportation adopts an order under section 60-4-104(2), MCA, subsection (3) of that section provides that the order creates a disputable presumption that there is a public *necessity* for the project, that the taking is *necessary* for the project, and that the project is planned or located in a manner compatible with the greatest public good and the least private injury. In a case involving a frontage road, evidence showing that all associated cost differential in routes was a direct result of the Department's 4-year delay in addressing potential routing problems made the Department's action arbitrary. State v. Standley Brothers, 215 Mont. 475, 699 P.2d 60 (1985).

In Fondren, involving an electric transmission line, the Montana Supreme Court discussed the relationship between the Montana Major Facility Siting Act, Title 75, chapter 20, MCA, and *necessity* under section 70-30-111, MCA. In that case, the dispute between the parties centered on whether the District Court had jurisdiction to determine whether the taking of Fondren's property was *necessary* to the public use, an electrical energy transmission line, because *necessity* for the transmission line and its location had been determined in administrative proceedings under the siting act. In analyzing the issue, the Montana Supreme Court looked to other jurisdictions that had similar statutory schemes. The general rule in those jurisdictions is that when the Legislature has delegated the power of determining the *necessity* of exercising the power of eminent domain to a private corporation or administrative agency, the corporation's or agency's determination of *necessity* is a political decision that is not subject to judicial review. Once a certificate has been issued under the siting act, an aggrieved party may seek judicial review of the issuance of the certificate under section 75-20-406, MCA. Once the certificate has survived any challenges, the certificate holder can commence acquiring property. If condemnation is required, the condemnor must file a complaint alleging the necessary facts under section 70-30-111, MCA, including that the taking is *necessary* for the construction of the facility. In sections 75-20-205 (now repealed) and 75-20-407, MCA, the Legislature had specifically restricted a court's jurisdiction, in eminent domain proceedings, to hear challenges to the *necessity* of taking private property when the property is taken in compliance with the siting act. The Supreme Court cautioned that the condemnor does not have free rein in the eminent domain proceeding. The condemnor must still allege the facts required to be found under section 70-30-111, MCA. However, the preponderance of the evidence is satisfied by appending to the eminent domain complaint the certificate

of environmental compatibility and public need and the administrative body's findings of fact, opinion, decision, order, and recommendations.

The cases that have been discussed all indicate that the District Court will consider a wide variety of evidence on the issue of whether a taking is *necessary* for a public use. The District Court must find that the condemnor has offered a preponderance of the evidence establishing that a particular property proposed to be taken is reasonably requisite and proper for the accomplishment of the purpose for which the property is sought under the particular circumstances of each case. The specific evidence introduced is left to the condemnor and the condemnee. The Montana Supreme Court has provided wide latitude in allowing evidence to be offered. The District Court must determine the weight to be given to the various evidence and determine if the condemnor has introduced a preponderance of the evidence.

The fourth factor listed in section 70-30-111, MCA, is the question of whether a proposed use is *more necessary* than an existing public use. This issue, which is not present in every condemnation case, was addressed in Cocanougher v. Zeigler, 112 Mont. 76, 112 P.2d 1058 (1941). In that case, Cocanougher sought to condemn a right-of-way through Zeigler's irrigation ditch for the purpose of conveying water to Cocanougher's property. The Supreme Court found that the proposed use must be *more necessary* if the effect of granting the succeeding public use condemnation will completely deprive the first owner of the first owner's use. The requirement for a *more necessary* public use does not preclude condemnation for a joint use that will not interfere with the existing use. This rationale was followed in Montana Talc Company v. Cyprus Mines Corporation, 229 Mont. 491, 748 P.2d 444 (1987), concerning competing mining interests, and Montana Power Company v. Burlington Northern Railroad Company, 272 Mont. 224, 900 P.2d 888 (1995), concerning locating a power line within a railroad right-of-way. In Montana Talc, the District Court issued a summary judgment finding that an open-pit excavation on the land of another for the purpose of mining an ore body on adjacent land was not an authorized public use and that the talc company could not show that the open-pit excavation was a more necessary public use. The Montana Supreme Court reversed the District Court and found that the open-pit excavation necessary to backslope the mining of an ore body is a public use. The Court also stated that the right of condemnation, once a public use is determined, cannot be delimited by section lines, fences, or different ownership. All real property belonging to any person can be taken to satisfy the public use. The Court cited Butte, Anaconda & Pacific for the proposition that the public welfare is the base upon which the correct application of the doctrine of eminent domain rests. The right of eminent domain may be of the greatest value to a corporation that may exercise its privileges, but that is an incident that must be subordinated by the courts to the question of public use and to the consideration of the benefits that accrue to the public by the construction of the contemplated project. The Court also found that a *more necessary* use does not mean a different use in all cases. The case was remanded to the District Court for a determination of whether a joint operation was feasible that would safeguard the rights of each party and accommodate the public good through both public uses.

As demonstrated, the Montana courts have had ample opportunity to consider the issue of *necessity* in eminent domain cases. However, the same is not true with regard to the issue of whether a taking is in the *public interest*. As previously indicated, the lack of litigation on this issue may be because the introductory clause of section 70-30-111, MCA, provides that before property can be taken, the condemnor is required to show by a preponderance of the evidence that the *public interest* requires the taking based on findings that the use is authorized by law, that the taking is *necessary* to the use, and that an effort to obtain the interest sought to be taken was made by submission of a written offer that was rejected. The question of whether a use is authorized by law is satisfied by citing the statutory authority enumerating the proposed use as a public use. It is also easy to show that a written offer was made and rejected. Therefore, the only issue that is generally subject to dispute is the issue of *necessity*. Yost is the one case that does discuss the *public interest* requirement contained in section 70-30-206(2), MCA. In Yost, the state sought to condemn land for a frontage road. At the trial, the state introduced its "amended resolution condemnation order" and then rested its case. Yost then introduced evidence that the 7-mile route would parallel the existing interstate highway, that the locality was already served by an existing network of roads, that the purpose of the project was to provide access to the interstate highway, that the proposed frontage road would not provide more access than existing county roads, that the proposed frontage road would not benefit the public, that the cost of the project was approximately $50,000 per mile, and that the proposed frontage road would disrupt Yost's farming practices. The state did not offer any rebuttal evidence, apparently believing that the resolution adopted by the Highway Commission was sufficient to establish the state's case. The District Court found that the taking was not *necessary*. On appeal, the Supreme Court noted that not only is the District Court required to determine the question of *necessity*, but it is also required to make a finding that the *public interest* requires the taking of lands before a preliminary condemnation order is issued. The Supreme Court noted that in the 1961 revision of eminent domain statutes, the Legislature had not amended the precursor of section 70-30-206(2), MCA, requiring a finding that the proposed taking is in the *public interest*. The Supreme Court noted that the Highway Commission resolution merely created a disputable presumption of *necessity* and concluded that the District Court judge had the authority to deny *necessity* based upon the evidence presented.

In summary, in order for a condemnor to establish that a taking is *necessary*, the condemnor must introduce evidence that the proposed taking is reasonably requisite and proper for the accomplishment of the purpose for which the property is sought under the particular circumstances of each case. The type of evidence introduced will vary depending upon the type of project for which the property is sought. Once the condemnor has introduced sufficient evidence to establish *necessity*, the burden shifts to the person opposing the taking to show by clear and convincing evidence that the condemnor's action is excessive or arbitrary. The question of whether a taking is *necessary* is a question of fact that is generally determined by the court. In those limited instances in which the Legislature has delegated the finding of *necessity* to another entity, the finding is a political decision that will not be overturned by the courts unless the party opposing the taking shows that the finding is arbitrary. The determination of arbitrariness must be established by clear and convincing evidence.

Under section 70-30-111, MCA, once the condemnor establishes by a preponderance of the evidence that the use is authorized by law, that the taking is *necessary* for the use, and that an effort was made to obtain the property sought to be taken by a written offer that was refused by the property owner, the *public interest* authorizes the property to be taken. However, prior to issuing a preliminary condemnation order, the District Court judge is required to make a finding that the taking is in the *public interest*. That finding must also be supported by a preponderance of the evidence.

Greatest Public Good and Least Private Injury

Section 70-30-110, MCA, requires that a condemnor may survey and locate a public use, but the public use must be located in the manner that will be most compatible with the greatest public good and the least private injury. Section 70-30-103, MCA, provides that right-of-way crossings, intersections, and connections must be made in a manner most compatible with the greatest public benefit and the least private injury. The siting or location issue arises after a taking of property has been found necessary for a specific public use.

The case of Montana Power Company v. Bokma, 153 Mont. 390, 457 P.2d 769 (1969), involving the taking of property for an electric powerline, contains a discussion of how the issue of greatest public good and least private injury is addressed. The Montana Supreme Court noted that the greatest good on the one hand and the least injury on the other are questions of fact that are to be determined in passing on the question of necessity. The Court also noted that the questions commonly arise in connection with the location of the proposed improvement. Because the condemnor has the expertise and detailed knowledge of the considerations involved in determining the location of the improvement, the condemnor's choice of location is given great weight. The condemnor's choice of location will not be overturned except upon clear and convincing proof that the taking is excessive or arbitrary. The Court also noted that when a condemnor fails to consider the question of the least private injury between alternate routes that are equal in terms of public good, the condemnor's action is arbitrary and amounts to an abuse of discretion. With respect to the powerline under consideration, the Court stated that the line had to be located somewhere. No matter where a powerline is located, some landowner's property has to be crossed. The evidence showed that alternative routes were considered and rejected for a variety of reasons. Based upon the evidence, the proposed taking of property was neither excessive nor arbitrary.

In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 Mont. 235, 696 P.2d 989 (1985), concerning an attempt to extend a sewer system, the Montana Supreme Court stated that once the condemnor has introduced sufficient evidence to establish *necessity*, the burden shifts to the person opposing the taking to show by clear and convincing evidence that the condemnor's action is excessive or arbitrary. In Bossing, the condemnor failed to show *necessity* because the condemnor failed to establish a reasonable present need or even a need in the reasonably foreseeable future to connect Bossing to the sewer project. The Court also provided an example involving an improvement. When the location of an improvement is chosen based on the expertise and detailed consideration

of the condemnor and evidence concerning that consideration is introduced at the hearing, the condemnor's choice may be overturned if the opposing party shows that the condemnor failed to consider the least private injury between routes that are equal in terms of public good. The example given in Bossing is in accord with the holding in Bokma.

In Schara v. The Anaconda Company, 187 Mont. 377, 610 P.2d 132 (1980), a mining condemnation action, the Montana Supreme Court relied on Bokma in stating that the condemnor's choice of location is to be given great weight, the choice is to be overturned only by clear and convincing proof that the decision was excessive or arbitrary, and an abuse of discretion will be found if the condemnor fails to study alternatives. The evidence indicated that the Anaconda Company had studied all alternatives and had rejected them as being economically infeasible. Condemnation of the Schara's land was the only feasible alternative to continue the life of mining in Butte.

Section 60-4-104(2), MCA, concerning state highway projects, provides that prior to commencing an eminent domain proceeding, the Department of Transportation is required to adopt an order declaring that:

> (1) public interest and necessity require the construction or completion by the state of the highway or improvement for one of the purposes set forth in 60-4-103;
>
> (2) the interest described in the order and sought to be condemned is necessary for the highway or improvement; and
>
> (3) the highway or improvement is planned and located in a manner which will be compatible with the greatest public good and the least private injury.

However, once the Department of Transportation adopts the order, section 60-4-104(3), MCA, provides that the order creates a disputable presumption that there is a public necessity for the project, that the taking is necessary for the project, and that the project is planned or located in a manner compatible with the greatest public good and the least private injury. This provision was construed in State v. Higgins, 166 Mont. 90, 530 P.2d 776 (1975). In that case, the Higgins' sought to show that a highway project could be routed over forest service land so that there would be no "private injury". The Montana Supreme Court noted that private injury is only one of the considerations present in an eminent domain proceeding. The Court found that the forest service land route would also be detrimental to the public good. The forest service land route would require the construction of more bridges, an economic consideration adverse to the public good. The forest service route would also damage the watershed and wildlife in the area. Given these factors, the Court concluded that there was no clear and convincing evidence that the route chosen by the Department of Transportation was an abuse of discretion or was arbitrary.

In an eminent domain proceeding, the greatest public good and the least private injury factor can be determined as part of the necessity determination, but the issue is almost always limited to the location of the project. When the location of a project is chosen based on the expertise and detailed consideration of the condemnor and evidence

concerning that consideration is introduced at the hearing, the condemnor's choice may be overturned only if the opposing party shows that the condemnor failed to consider the least private injury between routes that are equal in terms of public good. If a condemnor does not consider the least private injury between routes or if the condemnor does not consider alternative routes, then the condemnor's action may be found to be arbitrary.

Burden of Proof Pertaining to the Exercise of Eminent Domain

During the study of eminent domain, three questions were raised concerning the issue of burden of proof. (1) Where does the current burden of proof lie? (2) Is this appropriate? and (3) Do changes need to be made? This part describes the varying degrees of burden and who, during each phase of a condemnation proceeding, must meet the burden of proof.

General Background -- Evidentiary Standards

Burden of proof refers to either a party's duty to prove a disputed charge or assertion or a party's responsibility to demonstrate through evidence that a claim is true or desirable. Generally, the burden of proof lies with the party that brings a cause of action. Evidentiary standards concern the level or burden of proof that must be satisfied in a particular type of proceeding. There are three basic evidentiary standards or tiers of proof within the legal system. Each standard or tier is progressively more difficult to meet. The easiest standard to satisfy is the preponderance of evidence standard that traditionally applies in most civil cases. The next highest standard is the clear and convincing evidence standard that applies in civil cases in which the Legislature specifically requires that standard. The highest standard is the beyond a reasonable doubt standard that applies in criminal matters. These three standards are the standards applied by District Courts. If a District Court's decision is appealed, the Montana Supreme Court has adopted a substantial evidence standard to determine whether the District Court's determination was correct. The Supreme Court's review standard will be separately addressed later in this part.

In most civil matters, the burden of proof is a "preponderance of the evidence". *Black's Law Dictionary*, 6th ed. (1990), defines a preponderance of evidence as evidence that is of greater weight or more convincing than the evidence that is offered in opposition to it. With respect to the burden of proof in civil cases, the term means the greater weight of evidence or evidence that is more credible and convincing to the mind. The term is also defined as the degree of proof that is more probable than not.

In criminal matters, the burden of proof is "beyond a reasonable doubt". *Black's* defines that standard as fully satisfied, entirely convinced, or satisfied to a moral certainty. In certain types of civil proceedings, the Legislature has required a "clear and convincing" evidentiary standard. *Black's* defines that standard as proof that results in reasonable certainty of the truth of the ultimate fact in controversy. The term means proof that requires more than a preponderance of the evidence but less than proof beyond a reasonable

doubt. The term is further defined as stating that clear and convincing proof will be shown when the truth of the facts asserted is highly probable.

Montana courts have traditionally followed the defined evidentiary standards. In Fleming v. Lockwood, 36 Mont. 385, 92 P. 962 (1907), concerning damages for ditch seepage, the Supreme Court determined that the District Court had erred in giving an instruction requiring that damages had to be established by a "clear preponderance of the evidence". The Court noted that in using the word "clear" the District Court attempted to impose a greater burden on the plaintiff than the law required. The Fleming case followed Gehlert v. Quinn, 35 Mont. 451, 90 P. 168 (1907), involving the conversion of property, in which the Supreme Court held that an instruction requiring fraud to be "clearly and distinctly proven" was erroneous because the term meant something more than proven by a preponderance of the evidence. The instruction would vary the rule of law laid down by statute requiring only a preponderance of the evidence. The Court noted that courts in other states had held that in certain civil actions a higher quality of proof is required than in others, but that was not the rule in Montana.

The "clear and convincing" standard is used in 51 sections of the Montana Code Annotated, while a "preponderance" of evidence is used in 71 sections. Obviously, the Legislature has now chosen to require a higher level of proof in certain civil actions. However, the only instance in which the Legislature has attempted to define the "clear and convincing" standard is in the area of assessing punitive damages.

Section 27-1-221(5), MCA, concerning punitive damages provides:

> All elements of the claim for punitive damages must be proved by clear and convincing evidence. Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. It is more than a preponderance of evidence but less than beyond a reasonable doubt.

The language in section 27-1-221(5), MCA, concerning the standard of proof for punitive damages, was interpreted by the Montana Supreme Court in Cartwright v. Equitable Life Assurance, 276 Mont. 1, 914 P.2d 976 (1996), involving alleged misrepresentations and fraud by an insurance agent. In that case, the Supreme Court noted that in civil cases, it reviews a jury's findings to determine whether there was substantial evidence to support those findings. The Court also noted that the substantial evidence standard of review is normally applied to situations in which the burden of proof is satisfied by a preponderance of the evidence. The Court also noted that it had not previously analyzed whether actions that must be proven by clear and convincing evidence should be subject to review by something more than substantial credible evidence. The Court stated that it had upheld jury verdicts that awarded punitive damages when the verdict was supported by substantial evidence. See King v. Zimmerman, 266 Mont. 54, 878 P.2d 895 (1994), and Dees v. American National Fire Insurance Company, 260 Mont. 431, 861 P.2d 141 (1993). The Court then held that it would apply the substantial evidence test to punitive damage awards. In Cartwright, the evidence indicated that the agent told the Cartwrights that they

would have to pay only three premiums on a whole life insurance policy and that the policy would then be self-supporting. The agent told the Cartwrights that he would take care of the additional premium notices without notifying them that he was getting the insurer to make loans against the policy. Four other individuals testified that the agent had made similar representations concerning policies. Another agent for the insurer indicated that his investigation of complaints did not find any refuting evidence concerning the complaints. The second agent concluded that the selling agent had engaged in a regular practice of destroying the value of people's life insurance in order to sell them more life insurance. The Supreme Court concluded that the evidence supporting the punitive damage award was substantial credible evidence and that the evidence was clear and convincing.

In Cartwright, the Supreme Court also stated that in cases terminating parental rights, which are statutorily required to be based upon clear and convincing evidence, it had applied the substantial evidence standard of review. See In re S.C., 264 Mont. 24, 869 P.2d 266 (1994), and In re F.M., 248 Mont. 358, 811 P.2d 1263 (1991). However, in In re J.L., D.L. , and A.G., 277 Mont. 284, 922 P.2d 459 (1996), involving the termination of parental rights, the Montana Supreme Court adopted the holding of a Kansas case concerning clear and convincing evidence. In that case, it held that clear and convincing proof is simply a requirement that a preponderance of the evidence be definite, clear, and convincing or that a particular issue must be clearly established by a preponderance of the evidence or by a clear preponderance of proof. The Kansas court noted that the quality of proof is somewhere between a mere preponderance but not beyond a reasonable doubt.

In a case involving an appeal from an administrative determination of a collective bargaining unit, the Montana Supreme Court noted that section 2-4-704(2)(a)(v), MCA, provides that factual findings may be overturned when they are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record". The Court noted that prior interpretations of this standard were inconsistent. The Court then stated that if there is substantial credible evidence in the record, the findings are not clearly erroneous. If the record contains support for the factual determinations made by the agency, the courts may not weigh the evidence. The courts are bound by the agency findings. City of Billings v. Billings Firefighters Local No. 521, 200 Mont. 421, 651 P.2d 627 (1982). The same standard of review was applied to an agency review of a hearings officer's finding of fact in a sexual discrimination claim before the Montana Human Rights Commission in Moran v. Shotgun Willies, 270 Mont. 47, 889 P.2d 1185 (1995).

In Miller v. Frasure, 248 Mont. 132, 809 P.2d 1257 (1991), a workers' compensation case, the Montana Supreme Court followed Barrett v. Asarco, 245 Mont. 196, 799 P.2d 1078 (1990), and stated that substantial evidence necessary to support a finding of fact must be more than a scintilla, but may be somewhat less than a preponderance of evidence. Although it may be based on weak and conflicting evidence, in order to rise to the level of substantial evidence, it must be greater than trifling or frivolous. The Miller holding was followed in State v. Shodair Hospital, 273 Mont. 155, 902 P.2d 21 (1995), concerning reimbursement for a psychiatric patient's treatment.

Based upon the incidence of the terms "clear and convincing evidence" and "preponderance of the evidence" in the Montana Code Annotated, the Legislature has dramatically changed the statutory requirement since 1907. It is abundantly clear that when the Legislature uses the term "clear and convincing evidence", the Legislature intends that the level of proof be higher than the level of proof required under the "preponderance of evidence" standard that is traditionally applicable to civil cases. The determination of whether sufficient evidence has been introduced in order to meet the required level of proof is determined by the District Court. If the District Court's determination is appealed, the Montana Supreme Court has traditionally reviewed the record to determine if the record contains substantial credible evidence. However, based upon the holdings in Cartwright and In re J.L., the review will now determine whether the record contains substantial evidence that is clear and convincing.

Eminent Domain Proceedings

Within the framework of the exercise of eminent domain, the burden of proof shifts between condemnor and condemnee as the process proceeds and is dependent upon which party is making an assertion. Initially, as provided in section 70-30-111, MCA, the plaintiff (condemnor) has the duty to show by a preponderance of the evidence that the public interest requires the proposed taking. That section provides:

> Before property can be taken, the plaintiff must show by a preponderance of the evidence that the public interest requires the taking based on the following findings:
>
> (1) that the use to which it is to be applied is a use authorized by law;
>
> (2) that the taking is necessary to such use;
>
> (3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use;
>
> (4) that an effort to obtain the interest sought to be condemned was made by submission of a written offer and that such offer was rejected.

In Lincoln/Lewis & Clark County Sewer District v. Bossing, 215 Mont. 235, 696 P.2d 989 (1985), concerning an attempt to extend a sewer system, the Montana Supreme Court reconciled the holdings in City of Helena v. DeWolf, 162 Mont. 57, 508 P.2d 122 (1973), and State Highway Commission v. Yost Farm Company, 142 Mont. 239, 384 P.2d 277 (1963). The Supreme Court stated that once the condemnor has introduced sufficient evidence to establish *necessity*, the burden shifts to the person opposing the taking to show by clear and convincing evidence that the condemnor's action is excessive or arbitrary. In Bossing, the condemnor failed to show *necessity* because the condemnor failed to establish a reasonable present need or even a need in the reasonably foreseeable future to connect Bossing to the sewer project.

If the District Court determines that the plaintiff has met the burden of proof as required under section 70-30-111, MCA, the court must enter a preliminary condemnation order as provided in section 70-30-206, MCA. Following the preliminary condemnation order, the defendant (condemnee) has 30 days in which to file a claim of just compensation. If the

plaintiff (condemnor) fails to accept the defendant's claim for compensation, the District Court appoints a panel of condemnation commissioners.

Section 70-30-304, MCA, provides for an appeal by either party to the District Court from an assessment by the condemnation commissioners. The Montana Supreme Court, in State ex rel. Dept. of Highways v. Donnes, 219 Mont. 182, 711 P.2d 805, 42 St. Rep. 1938 (1985), stated that the landowner has the burden in eminent domain proceedings to prove entitlement to just compensation in excess of that offered by the condemnor.

In cases in which the defendant claims that a condemnation is excessive or arbitrary, the burden falls upon the defendant. In Cenex Pipeline, LLC. v. Fly Creek Angus, Inc., 1998 MT 334, 292 Mont. 300, 971 P.2d 781 (1998), the burden to prove that Cenex acted in an arbitrary and capricious manner fell on the landowner. The Supreme Court deterrnined that since the other impacted landowners were contacted regarding the pipeline proposal and all had reached a financial agreement concerning the necessary land, Fly Creek failed to prove that Cenex's action was arbitrary or capricious.

JUST COMPENSATION AND THE EXERCISE OF EMINENT DOMAIN

Article II, section 29, of the Montana Constitution, provides:

> Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss . . .

Both the Montana Constitution and the United States Constitution are clear regarding the connection between the taking of private property for public uses and the required compensation that must be awarded to the property owner. A property owner whose land is being subjected to a taking must be compensated for the loss or damage to the property in an amount equal to the fair market value of the property.

Section 70-30-313, MCA, defines fair market value as the price that would be agreed to by a willing and informed seller and buyer, taking into consideration, but not limited to, the following factors:

(1) the highest and best reasonably available use and its value for such use, provided current use may not be presumed to be the highest and best use;

(2) the machinery, equipment, and fixtures forming part of the real estate taken; and

(3) any other relevant factors as to which evidence is offered.

In Department of Highways v. Schumacher, 180 Mont. 329, 590 P.2d 1110 (1979), the Supreme Court reaffirmed the statutory intent of section 70-30-313, MCA, by saying that the test of just compensation for property condemned is "market value". Market value is what a willing buyer would pay to a willing seller for the estate or interest being transferred. Findings of a consistent nature were developed in State v. Lee, 103 Mont. 482, 63 P.2d 135 (1936), and State v. Hoblitt, 87 Mont. 403, 288 P. 181 (1930).

In *The Worst Tax?: A History of the Property Tax in America*, Glenn W. Fisher writes that there are three basic approaches to valuing property--the comparative sales approach, the income approach, and the cost approach.

The comparative sales approach is based on the idea of comparing the property to be assessed with similar, recently sold properties. The sales prices of the comparison properties are adjusted to allow for differences between the comparison properties and the subject property. The appraiser must use judgment and knowledge of the market to assign a value to the subject property.

The income approach is based on the idea of capitalizing the expected stream of income to convert annual values to capital values. Under this method, it is important to consider that the property is being valued, not the income or the management. Therefore, the methodology must consider that under average management, a property should be able to generate a certain level of income. The capitalized rate is the rate that investors in similar property are receiving.

The cost approach is based on the principal of substitution. A rational person would not pay more for an existing building that the cost of constructing a new building of equal utility. The value of an existing building is the cost of replacing it with a building of similar utility minus the depreciation resulting from physical deterioration or obsolescence. To this value must be added independently determined land values.

According to Fisher, theoretically, all three methods would yield the same result. However, in many cases, the information needed to conduct an accurate appraisal may not be available. Therefore, it would hold that in each case, the importance of the determination of just compensation should lie with the determination of fair market value, regardless of the method used. In State v. Heltborg, 140 Mont. 196, 369 P.2d 521 (1962), the Court stated that income could be used as a basis for arriving at market value in a condemnation case in which testimony of the various witnesses for both the landowners and the state, who explained their method of valuation, used the same general approach in determining the loss in value, which approach was labeled the "capitalization of income" approach. Similarly, in Department of Highways v. Olsen, 166 Mont.139, 531 P.2d 1330 (1975), the Supreme Court reasoned that once a proper foundation has been laid as to the witness's expertise, the witness should be permitted to give an opinion using any of the accepted means of calculating value, such as market data, reproduction costs, or income capitalization.

The Process

The process to determine compensation for property designated to be taken begins with the provisions of section 70-30-111, MCA. Before a condemnor may take private property, the condemnor must demonstrate that it meets the test contained in the section, including that the condemnor made an attempt, through a written offer, to purchase the property and that the offer was refused by the condemnee. If, following the proceedings to determine the facts of the case, the District Court issues a preliminary condemnation order, the

provisions of section 70-30-207, MCA, apply. Specifically, the condemnee must file a statement claiming compensation within 30 days of the issuance of the preliminary condemnation order. If, within 20 days of the condemnee's claim, the condemnor does not accept the claim, the court appoints three condemnation commissioners to hear evidence related to the value of the property to be taken.

Section 70-30-301(3), MCA, establishes the primary duties of the compensation commissioners. This subsection states that the commissioners must determine:

- the fair market value of the property sought by the condemnor, including any improvements on the property;
- the depreciation, if the parcel being taken is part of a larger parcel, that would accrue to the remaining property;
- how much the portion not sought to be condemned will benefit, if at all, by the construction of the improvements proposed by the plaintiff; and
- if the property sought to be condemned is for a railroad, the cost of fences and cattle guards along the railroad.

Section 70-30-302, MCA, provides that the right to compensation accrues on the date of the summons and that the fair market value is the measure of compensation for all property actually taken and any depreciation associated with property not actually taken but injuriously affected. However, no improvement placed on the property subsequent to the date of the summons may be included in the assessment of compensation or depreciation. If the court issues an order putting the condemnor in possession of the property, the full amount finally awarded draws interest at a rate of 10% annually until the date on which the right to appeal to the Montana Supreme Court expires or the date of the Supreme Court's final decision or until the date that the condemnee withdraws the full amount finally awarded, whichever date occurs first.

Under section 70-30-303, MCA, the final report and award of the commissioners must be filed within 10 days after the completion of the hearing or within such additional time as allowed by the judge upon a clear showing of necessity and must be filed with the clerk of court. Two of the three commissioners must agree to the award. If there is not concurrence among two of the commissioners, the District Court is required to appoint new commissioners to proceed to determine any award upon which the previous commissioners failed to agree.

Section 70-30-304, MCA, provides that any party may appeal the commissioners' decision to the District Court within 30 days of notification of the commissioners' decision and that unless waived by both parties, the matter must be tried before a jury. That section also provides that once the decision of the commissioners or a verdict becomes final, the property remains with the condemnor. If the party appealing the decision of the commissioners is not successful in achieving that party's interests, the party may not recover the costs of the appeal, but all the costs of the appellee must be recovered from the appellant.

The condemnor shall, within 30 days after an appeal is perfected from the commissioner's award, submit to the condemnee a written final offer of judgment for the property to be condemned with any necessary expenses that the condemnee accrued. A final award judgment is issued by the court once the condemnee informs the court that the offer has been accepted. In the event of litigation in which the condemnee prevails by receiving an award in excess of the final offer of the condemnor, the court shall award necessary expenses of litigation to the condemnee.

The condemnor must pay the sum of money assessed within 30 days after final judgment. Section 70-30-308, MCA, establishes two payment options for property owners. The condemnor may pay the property owner directly or may deposit the payment with the court. The condemnee has the option of determining whether the payment is received on an annual installment or through an exchange of land of equal or greater value. In the event that payment is not made to the condemnee, the court, after determining the conditions of nonpayment, must declare the entire condemnation proceedings invalid and restore the ownership of the property to the condemnee if possession had been given to the condemnor. Finally, after the payments have been made by the condemnor, the court issues a final order of condemnation.

There are three important aspects of determining just compensation that are inherent in the process described in this part. The first is that the condemnee has the burden to prove an entitlement to an amount of compensation above the amount offered by the condemnor. The Montana Supreme Court established this in its decision rendered in State ex rel. Department of Highways v. Donnes, 219 Mont. 182, 711 P.2d 805 (1985). Second, in Meagher County Newlan Creek Water District v. Walter, 169 Mont. 358, 547 P.2d 850 (1976), the Supreme Court stated that just compensation for a public taking of private land is to be computed as follows: the fair market value of the land taken, plus the value of the remainder before the taking minus the value of the remainder after taking. Finally, in State Highway Commission v. Robertson & Blossom, Inc., 151 Mont. 205, 441 P.2d 181 (1968), and State Highway Commission v. Renfro, 161 Mont. 251, 505 P.2d 403 (1973), the Supreme Court offered its direction regarding the determination of the value of the "remainder". In essence, to determine what is the "remainder" of property taken under a statute providing for damages for depreciation in value of a portion of land not sought to be condemned, there are generally three tests: (1) unity of ownership; (2) contiguity; and (3) unity of use.

Liability Considerations Pertaining to the Exercise of Eminent Domain

The general rule applied to legal questions concerning the liability of easement holders states that the dominant estate or tenement is liable for damage or injury to the servient estate or tenement. In other words, the holder of the easement is liable for any damage caused to the owner of the land that the easement crosses or occupies. There is no specific section of law establishing or limiting liability of an easement holder or the

landowner in Montana's eminent domain laws. Therefore, the general rule applies to land taken by eminent domain.

There are exceptions to this general rule. Section 69-4-505, MCA, provides that an individual engaged in excavation work is liable for damages to underground facilities (e.g., electric, oil, gas, fiber-optic, cablevision, etc.) if that person fails to comply with the provisions of notification found in section 69-4-503, MCA. The excavator is not liable for damages caused to underground facilities if the location and marking of the facilities is not provided within 2 business days. Even with notification having been given and the facilities having been marked, the excavator must proceed in a cautious and prudent manner.

A second exception is the willful and wanton act of an individual. Should an individual (not the easement holder) knowingly cause damage or injury to a facility contained on or within an easement, the easement holder is not liable for the damage caused to the property surrounding the easement.

Reversion or Sale of Property When Use is Abandoned

Occasionally, property that was obtained for a public purpose through the use of eminent domain is abandoned or the public purpose for which it was acquired is terminated. Under those circumstances, the property acquired by eminent domain, by means other than fee simple, either reverts to the person from whom the property was taken or to that person's successor in interest. If the property was acquired in fee simple, the property may be sold.

Abandonment

Black's Law Dictionary, 6th ed. (1990), defines "abandonment" with respect to property as follows:

> "Abandoned property" in a legal sense is that to which owner has relinquished all right, title, claim, and possession, but without vesting it in any other person, and with intention of not reclaiming it or resuming its ownership, possession or enjoyment in the future. There must be concurrence of act and intent, that is, the act of leaving the premises or property vacant, so that it may be appropriated by the next comer, and the intention of not returning. Relinquishment of all title, possession, or claim; a virtual intentional throwing away of property.

Black's defines "abandonment" with respect to easements, as follows:

> To establish "abandonment" of an easement created by deed, there must be some conduct on part of owner of servient estate adverse to and inconsistent with existence of easement and continuing for statutory period, or nonuser must be accompanied by unequivocal and decisive acts clearly indicating an intent on part of owner of easement to abandon use of it. Permanent cessation of use or enjoyment with no intention to resume or reclaim.

> Intention and completed act are both essential. A mere temporary or occasional obstruction or use of an easement by the servient owner is not an "abandonment."

Montana law addresses the presumption of abandonment in section 70-9-803, MCA, by providing that, generally, property is presumed abandoned if it is unclaimed by the apparent owner during the 5 years after the owner's right to demand the property or after the obligation to pay or distribute the property arises, whichever first occurs. This statute provides the 5-year limitation on nonuse. If an easement acquired for a specific use is not "used" for that specific use within the 5-year timeframe, the easement is considered abandoned. The 5-year time period may also be tolled in instances in which an act of God or litigation prevents the actual use of the easement or right-of-way. For certain specific uses, such as county roads and water rights, there are exceptions to this presumption of abandonment. The abandonment of a county road must follow a specific process, which is statutorily defined. Sections 7-14-2601 and 7-14-2615, MCA, provide for that process. Abandonment of water rights is addressed in section 85-2-404, MCA. Under this section, the appropriator must cease to use all or part of an appropriation right or cease using the appropriation right according to its terms and conditions for a period of 10 successive years. There must also have been water available for use during those years. Section 85-2-405, MCA, addresses the procedure for declaring appropriation rights abandoned.

Application to Eminent Domain

With this general concept of abandonment in mind, there are two scenarios to consider when discussing abandonment in an eminent domain context.

(1) The use for which the property condemned has not been "installed".

Under this scenario, easements or rights-of-way acquired through eminent domain must be put to the use for which the property was condemned within 5 years or that property is considered abandoned, unless the time period is tolled.

(2) The use for which the property was taken was "installed" but has not been active.

If the use was originally installed in the easement but has not been "used" for 5 years, then the easement or right-of-way would be considered abandoned. For example, in the case of a pipeline that was installed on a particular route and for some reason the company changes routes or uses some alternative shipping process, if the "use" (pipeline) for which the property was originally taken has not been in service for 5 years, then the easement/right-of-way is considered abandoned.

Once the use of property acquired by eminent domain is abandoned or terminated, there are two statutes under eminent domain law that address the reversion or sale of the property. These two statutes are sections 70-30-321 and 70-30-322, MCA. The Montana Department of Transportation (DOT) has a different method for the reversion or sale of

property, which is outlined in sections 60-4-201 through 60-4-203 and 60-4-205, MCA. The DOT method will be discussed later in this part.

The process, outlined in statute, for the reversion or sale of property that was obtained through condemnation actions depends upon the type of interest taken--fee simple title or another form such as easement or right-of-way.

General Process

Fee Simple Title Interest

Section 70-30-321(1), MCA, provides that if the interest obtained in the property was fee simple title, the seller may sell the interest to the highest bidder. Section 70-30-321(2), MCA, provides that if the seller chooses to sell the property to the highest bidder, the seller must publish notice of the public sale in a newspaper published in the county in which the real property interest is located. This notice must be published once each week for 4 consecutive weeks and must contain a list of all the tracts to be offered for sale showing the township and range in which they are located and describing them with reference to section number and subdivision of the section or with reference to block and lot if surveyed, the number of acres in unplatted lands, and the appraised value per acre and the appraised value of each lot. The sale of the property must occur in the county where the property is located.

Section 70-30-322(1), MCA, provides that the owner from whom the real property interest was originally acquired or the owner's successor in interest must be notified by the seller that the property will be sold. The original owner or the owner's successor in interest has a 30-day option from the date of a sale to purchase the interest. This purchase price must be equal to the amount of the highest bid received for the interest in property at the sale. However, if more than one person claims an equal entitlement to the interest in property, the option may not be exercised.

Section 70-30-322(2), MCA, provides that if no bids are received for the interest in property and the optionholder indicates the desire to exercise the option in writing, the seller is required to have the property appraised and to sell the property to the optionholder at the appraised price.

Interest Other Than Fee Simple Title

Sections 70-30-321(3) and 70-30-322(3), MCA, provide that when an interest other than fee simple title was obtained in the property by eminent domain, the property reverts to the original owner or the owner's successor in interest. This provision normally applies when the interest acquired was an easement. Section 70-15-210, MCA, describes a reversion as the residue of an estate left by operation of law in the grantor of the grantor's successors, commencing in possession on the determination of a particular estate granted. This description comports with the definition of "reversion" contained in *Black's Law Dictionary*, 6th ed. (1990). It provides, in part:

> A future interest under which a grantor retains a present right to a future interest in property that the grantor conveys to another; usually the residue of a life estate. . . . It is a vested interest or estate, in as much as person entitled to it has a fixed right to future enjoyment.

Simply stated, reversion means that the ownership of an easement taken by eminent domain is restored to the property owner from whom the easement was taken or to that person's successor in interest if the public use for which the easement was taken is abandoned or terminated.

Montana Department of Transportation Procedures

The DOT procedure with regard to the abandonment of property that is taken through eminent domain and the sale or reversion of that property is slightly different than the procedure that applies to other entities.

Section 60-4-204, MCA, was repealed by the 1995 Legislature. As background information, section 60-4-204, MCA, provided the same process for the sale of property obtained through condemnation that is currently outlined in the eminent domain statutes. With the repeal of section 60-4-204, MCA, in cases where the interest taken in property was fee simple title, the DOT is no longer required to allow the original property owner or successor in interest an option to purchase the interest at the sale price. Sections 60-4-201 through 60-4-203 and 60-4-205, MCA, outline the current process that must be followed by the DOT.

The DOT may determine that it wishes to sell land acquired for highway purposes. The DOT is required to sell any land valued in excess of $2,500 at public auction. The only difference between the DOT's requirements and others governed by the eminent domain laws is that in the DOT process, the original landowner or successor in interest does not have the option of meeting the sale price and the DOT may exchange the land for other land needed for highway purposes. The DOT is required to notify the owner or successor in interest of its intention to exchange the interest. The owner from whom the interest was originally acquired by the state or the owner's successor in interest has the right to require the department to offer the land for sale in the manner set forth in sections 60-4-202 and 60-4-203, MCA. The owner is required to make the demand for sale by registered or certified mail to the DOT within 10 days after receipt of notice from the DOT.

The publication of the notice of sale and the content of the notice are the same as those required for the sale of property acquired by eminent domain by other entities. Section 60-4-203, MCA, contains specific appraisal requirements that apply to a DOT sale. Section 60-4-205, MCA, provides that if no bids are made at the public sale or if the original owner or the owner's successor in interest does not make an offer, the DOT may sell the property interest at a private sale. At the private sale, the DOT may accept an amount of money that is not less than 90% of the appraised value.

Chapter 5: The Use of Eminent Domain

HJR 34 requested that the use of eminent domain be a portion of the study on eminent domain. In an effort to fully understand how eminent domain is being exercised in Montana, the Subcommittee reviewed the information that was received from entities that have been granted the authority to exercise the right of eminent domain on behalf of the state (see Chapter 2, Historical Use of Eminent Domain in Montana).

The information on the numbers of condemnations, which was received from the companies or agencies with the right to exercise eminent domain, was helpful, but the Subcommittee felt that the numbers only told part of a bigger story. After reviewing the information, there were still questions. Who has the authority to exercise the right of eminent domain in other states? How does this compare with Montana? How do those affected by a project that could be installed through the use of eminent domain feel the process works?

This chapter will discuss the information that the Subcommittee gathered in an attempt to answer these questions.

Authority to Exercise the Power of Eminent Domain

Montana -- Who Has the Authority?

The authority to use the power of eminent domain rests with the state, with "state" meaning all levels of government. The right of eminent domain may be exercised in the manner provided in Title 70, chapter 30, MCA. In Montana, this authority has been granted to various entities. These entities act as agents of the state in providing a public use. The rules of eminent domain apply no matter which entity is exercising the right--a government entity or a private entity. Below is a list of those entities that are specifically designated in the Montana Code Annotated as being able to exercise the power of eminent domain and the specific statute that gives them this power. Many of these entities have specific situations and/or conditions under which they can exercise eminent domain and are mentioned in numerous sections, which apply to the public use being addressed. The referenced statute should be reviewed to ensure understanding of their authority.

Even though an entity may be granted the authority to exercise the right of eminent domain, that entity is still restricted by 70-30-102, MCA, to the specific public uses enumerated by the Legislature.

Figure 4. Entities Authorized to Exercise the Right of Eminent Domain

Entity	MCA Section
Cities and Towns	7-5-4106; 7-13-4404; 7-13-4406; 7-14-4501; 7-14-4622; 7-14-4801; 7-16-4106; 67-2-301; 67-5-202; 67-6-301; 67-10-102; 76-5-1108
Municipalities	7-1-4124; 7-15-4258; 7-15-4259; 67-6-301; 67-10-201
Counties	7-14-2123; 7-14-2621; 7-14-2803; 7-14-2804; 7-14-2829; 7-16-2105; 7-35-2201; 67-6-301; 67-10-102; 76-5-1108
County Water and Sewer Districts	7-13-2218
Consolidated Local Government Water Supply and Sewer Districts	7-13-3041
Irrigation Districts	85-7-1904
Conservancy Districts	85-9-410
Highway Authorities	7-14-101; 60-5-104
Railroad Authorities	7-14-1625
Municipal Housing Authorities	7-15-4460; 7-15-4461; 7-15-4462
Airport Authorities	67-11-201
Regional Water and Wastewater Authorities	75-6-313
Parking Commission	7-14-4622
Joint Airport Board	67-10-205
Adjoining States	67-11-401
Public Utilities and Carriers	69-13-104
Rural Cooperative Utilities	35-18-106
Natural Gas Public Utilities	82-10-303

Entity	MCA Section
Mining Companies	82-2-221
Railroad Corporations from Other States	69-14-513; 69-14-536
Montana Railroad Corporations	69-14-552
Cemetery Associations	35-20-104
Department of Fish, Wildlife, and Parks	23-1-102; 87-1-209
Department of Public Health and Human Services	53-2-201
Department of Transportation	60-4-104; 60-4-111; 67-2-301; 67-6-301; 75-15-123; 75-15-223
Department of Environmental Quality	75-10-720; 82-4-239; 82-4-371; 82-4-445
Department of Natural Resources and Conservation	85-1-209; 85-1-204
Board of Land Commissioners	76-12-108

Entities Authorized to Exercise Eminent Domain in Other States

This matrix gives an overview of those entities authorized to exercise the right of eminent domain in each state. Under each heading, the number of entities that fall into that group is given.

Figure 5. Entities Authorized to Exercise the Right of Eminent Domain – by State

	Government State, County, City, Town, Municipalities	Agency	Associations	Authorities	Boards	Commissions	Conservancies
Montana	9		1	5	2	1	
Alabama	14	4	2	28	6	2	
Arizona	17			4			
California	22	4		7	5		3
Colorado	20			7	6		
Idaho	10			3	5		
Nevada	6	2		1	3		

	Districts	Any Person, Firm, Public Entity	Cooperatives	Corporations	Public Utilities	Other
Montana	4		1	3	2	
Alabama	9	2	1	18	17	1
Arizona	12	2	1	2	7	
California	42	1		3		3
Colorado	49	5		17	7	4
Idaho	10			1	1	1
Nevada	5	1		4	3	

Mitigation and Standards/Specifications Potentially Associated With Eminent Domain Actions

Many of the public uses outlined in Chapter 4 include the installation of projects that may require the issuance of a permit and the associated Montana Environmental Policy Act (MEPA) review. Because the projects that are installed to achieve the defined public use may potentially require permits, the Subcommittee reviewed information provided by staff and during a panel discussion to better understand the process. As was discussed at many meetings, an interim study related to the permitting statutes and process may be a more appropriate forum for this discussion.

Are mitigation measures provided for in Montana statutes?
Any mitigation measures that are required in Montana are addressed through the various permits that are associated with a project. Any time a permit is applied for, the MEPA process is triggered.

Are mitigation measures provided for in Montana's rules?
The *Montana Index of Environmental Permits* is an excellent resource when trying to determine where the rules associated with each permit are located in the Administrative Rules of Montana.

Are industries required to mitigate environmental damage on condemned property?
This issue is addressed through the permit process and the MEPA review that must be completed before the issuance of a permit. Depending on the type of permit, the industry can be required to mitigate the damages.

Are there mitigation measures to protect streams, groundwater, and wetlands?
Any stipulated mitigation measures are contained within the various permitting processes. Mitigation measures are usually specific to the project.

Does the state ensure that the environmental protections and state-of-the-art technologies that are required on public lands are also required on private lands?
The state does not currently have statutory language that specifically states that environmental protections and state-of-the-art technologies that are required on public land must also be applied to private land. The Forest Service can stipulate bonding requirements, mitigation measures, and construction, operation, and maintenance

standards through the special use permit that must be obtained by the company installing the project. (Egenhoff, 1999) The state can stipulate bonding requirements and mitigation measures through its permitting process as well. (Ring, 1999). The standards that pipeline companies must follow for construction, operation, and maintenance are delineated by the National Department of Transportation, Office of Pipeline Safety. These standards are located in the Code of Federal Regulations (CFR), parts 190-199. These are minimum standards that companies must comply with. Some states have implemented their own laws further outlining such things as responsibility and safety standards.

What does the state require in terms of bonding/liability?
The state can require bonding through its permits. However, what these bonds apply to varies by permit. On the federal level, the Oil Pollution Act of 1990 requires spill response planning that must be reviewed and approved by the Office of Pipeline Safety. Some companies take out additional insurance policies to ease landowners' fears about environmental damage. One company for instance, took out, in addition to any current insurance policies they may have, an additional $10 million insurance policy for environmental damage. (Springer, 2000) This of course is up to each individual company.

Bonding Requirements in Montana

In an effort to answer the questions regarding bonding in Montana as well as to review other states' bonding provisions and their relationship to eminent domain laws, the following information was presented to the Subcommittee.

The Subcommittee was interested in what other states require with regard to bonding and the condemnation process. Colorado was identified as a state that incorporates bonding requirements within its eminent domain laws. Discussions with Colorado's legislative staff did not provide much information, as they were not very familiar with the law and could provide no background information on the initial purpose of the law or how it is being used today.

In Montana, bonding is not included in the eminent domain laws. However, there are laws that allow bonding in other areas of the Montana Code Annotated. Before deciding if a special type of bond needs to be implemented through the eminent domain laws, an understanding of current bonding protocols is necessary.

The first step in understanding bonding in Montana is to discuss the different types of bonds and how they are used.

Large Diameter Pipelines

Performance Bonds

In relationship to pipelines greater than 17 inches in diameter and more than 30 miles in length, bonds are primarily for the construction phase. These bonds help to ensure compliance with the terms of the certificate of environmental compatibility (certificate) issued by the Department of Environmental Quality (DEQ) or Board of Environmental Review.

BONDING IS NOT INCLUDED IN THE EMINENT DOMAIN LAWS, BUT IS ALLOWED IN OTHER AREAS OF THE MONTANA CODE ANNOTATED.

The performance bonds also help to ensure compliance with the environmental specifications developed for the project by the DEQ. Should the owner fail to comply with terms of the certificate and the environmental specifications, the owner would be subject to the penalties outlined in section 75-20-408, MCA. The DEQ would access and expend the construction performance bond for the purpose of ensuring that the conditions of the certificate pertaining to reclamation and revegetation are met.

Reclamation and Revegetation Bonds

Reclamation bonds are used to ensure that the sites affected by the project are reclaimed in a manner that returns the affected area to the reclamation standards defined in the certificate. There are specific standards set for each project that determine reclamation bond release or that determine if expenditure of the reclamation bond is necessary to meet the requirements of the certificate unless otherwise determined by the Board. This bond could be used to ensure that regrading and other dirt work, cleanup, and fencing are completed. The revegetation bond is used for any additional seeding and weed control during the first 5 years. Should the owner (the entity installing the project) fail to comply with these reclamation standards, the owner would be subject to penalties listed in section 75-20-408, MCA, and the Board or the DEQ would access the bond for the purpose of ensuring that the conditions are met.

Spill or Cleanup Bonds

Currently, Montana does not have any specific bonds addressing spills or cleanup expenses.

If there are no bonds for "cleanup", who ensures that in the event of a spill, it is cleaned up?

Interstate pipelines - pipelines that cross state boundaries.

All pipelines that are installed are required to meet the federal Department of Transportation, Office of Pipeline Safety standards. For each project, the entity installing the pipeline must develop an Emergency Response Plan, which includes response zones. A *response zone* is a geographic area either along a length of pipeline or including multiple pipelines, containing one or more adjacent line sections,

for which the operator must plan for the deployment of, and provide, spill response capabilities. The size of the zone is determined by the operator after considering available capability, resources, and geographic characteristics (49 CFR 194.5). A *response plan* consists of the operator's core plan and the response zone appendices for responding to the maximum extent practicable to a worse case discharge of oil or to the substantial threat of such a discharge (49 CFR 194.5). There are exceptions to this rule based on the size of the pipe and spill history of the line. However, this generally applies. Under 49 CFR 194.103, each operator is required to submit a statement with its response plan identifying which line sections in a response zone can be expected to cause significant and substantial harm to the environment in the event of a discharge of oil into or on the navigable waters.

Intrastate pipelines - pipelines that lie entirely within the Montana border.
Pipelines that lie entirely within Montana are not overseen by the Office of Pipeline Safety. Rather, this oversight is passed on to the local regulator under 49 CFR 195, Appendix A. In Montana, this local regulator is the Montana Public Service Commission.

When do bonds apply?
Montana does not have a law specific to bonding for pipelines. The bonding that does occur is put into effect through the permitting process. When a project requires a permit, the agency giving that permit can implement certain specifications that must be met in order for the project to be permitted. One of these specifications may be the posting of a bond for various reasons--construction bonds and reclamation bonds are two examples. However, the law under which the permit is issued must allow for such a bond. Note that many laws do not provide for a bond.

What triggers permits?
Bonding in Montana might come through the issuance of permits if the law overseeing these permits provides for a bond. The installation of a pipeline triggers a permit under the Montana Pollutant Discharge Elimination System (MPDES). MPDES regulations (ARM 17.30.1332) require a storm water discharge permit for construction activity in which clearing, grading, and excavation will result in the disturbance of greater than 5 acres total or the disturbance of less than 1 acre if located within 100 feet of a surface water body (stream, river, or lake). If this permit is needed for a pipeline project, an Erosion Control Plan must be designed by qualified personnel and subsequently approved by the DEQ prior to construction activities. The objective of the plan is to minimize erosion of disturbed areas during the construction and postconstruction phases of a project.

The Major Facility Siting Act also affects pipelines. However, this Act only affects pipelines with an inside diameter of 17 inches or greater and more than 30 miles in length. If a pipeline does meet the 17-inch requirement, then the DEQ develops an Environmental Specifications Manual for the project that may become a requirement of

the certificate. Part of the environmental specifications may include construction and reclamation bonds.

If a pipeline is less than 17 inches inside diameter, it does not fall under the Major Facility Siting Act requirements. Therefore, there is really no state oversight on the project and there are no bonds posted.

Hard-Rock Mining
The DEQ's Permitting and Compliance Division has produced a Bonding Procedures Manual. This manual provides information on bonding authority, bonding levels, and bonding goals. It also discusses bonding protocols, facilities bonded, bond calculations, bond instruments, bond tracking, 5-year bond review, bond release, and bond forfeiture.

Panel Discussion Related to Mitigation, Standards/Specifications, and Bonding

The Subcommittee Work Plan address comparing mitigation measures that are used on public land versus private land and identifying and comparing the level of science that is used on public land versus private land. Outlined below is a panel discussion that was held at the Subcommittee's December meeting.

Tom Ring, Environmental Specialist, Department of Environmental Quality, reported that the Major Facility Siting Act (MFSA) regulates pipelines with diameters greater than 17 inches in diameter and 30 miles in length, electric transmission lines with capacities greater than 69 kilovolts, and energy diversion facilities greater than 250 megawatts. When the department receives an application for a major new pipeline facility, it reviews and considers the need for the facility, the nature of the probable environment impacts, the state of the available technology, and the nature and economics of the various alternatives. They need to determine that the location of the proposed facility conforms to state and local laws; that the facility will serve the public interest, convenience, and necessity; and that the necessary decisions, opinions, orders, certifications, and permits have been issued. For linear facilities, the selection of the location for a facility that minimizes the environmental impact and cost-effective mitigating measures appropriate for that facility are integral parts of the certification process. Typically, the mitigating measures become requirements of the certificate issued by the department. The MFSA allows the department to require applicants to post performance bonds to guarantee successful reclamation or revegetation of the project lands.

Express Pipeline is a pipeline the department has certified under the MFSA. It is approximately 300 miles long and required two bonds. One bond was set at $1,000 per mile for reclamation, and another was set at $1,000 per mile for revegetation. Generally surety bonds are posted rather than cash or property bonds. The bond is released within a year or two after completion of the project. Under the department's

administrative rules, the vegetation criteria holds that during the first complete growing season after construction, the perennial plant cover should be 30% of the cover found on adjacent areas, excluding nondesirable species. After 5 years, the perennial plant cover should be 90% of that on adjacent areas with similar soils and topography.

During the certification hearings for the Express Pipeline, the Board of Environmental Review struggled with an issue late in the process. This involved whether or not there would be adequate resources in the case of a future spill. Bonding statutory authority is not present in the law for spills. The Board did not take action on this issue.

REP. SCHOCKLEY questioned whether a property bond could be used. **Mr. Ring** explained that the law did not specify the type of bond to be accepted. Surety bonds have been used in the past. Property bonds are allowed under the Hard Rock Mining Act, and he did not believe that the department would object to using a property bond.

MS. LEE requested information on pipeline safety standards. **Mr. Ring** maintained that Montana did not have statutes to regulate pipeline safety. Interstate pipelines are governed by the federal Department of Transportation, Office of Pipeline Safety Regulations. After the Exxon accident in Alaska, the Oil Pollution Act of l990 was passed. This law establishes liabilities for companies and a trust fund to clean up damages. It applies to navigable waters and shorelines. He questioned whether this would apply to all areas of Montana or only the stream channels. The act mentions the ability to cover damages to groundwater.

At the time Express Pipeline was certified, the Board understood that a certificate of financial responsibility in the amount of $150 million would be provided. Express Pipeline maintains that Congress has removed that requirement.

CHAIRMAN COLE questioned the regulation of pipelines that did not fall under the MFSA (those less than 17 inches in diameter or less than 30 miles in length). **Mr. Ring** explained that the project sponsor would need to apply for permits from the proper regulatory agency. These permits would include air quality, water quality, encroachment permits, etc. Local requirements would apply.

Terry Egenhoff, United States Forest Service, remarked that when the Forest Service grants a right-of-way for oil and gas pipelines across federal lands they use a special use permit, which can include bonding, mitigation measures, and standards that need to be met during construction as well as during the operation and maintenance phase of the project.

The permit requirements usually do not extend beyond federal lands. They cannot require a bond to cover nonfederal interests. Some mitigation measures required in federal permits may apply to private lands outside of federal jurisdiction. The

regulations that implement this statute are being revised. Even though the mitigation measures are limited to federal lands, when there is an environmental analysis under the National Environmental Policy Act (NEPA) or Montana Environmental Policy Act (MEPA) for consideration of potential mitigation measures, they are required to look at the impacts of the entire project including impacts to nonfederal lands. The EIS is a comprehensive review of the entire project, but the terms and conditions in a permit apply only to federal lands. The Office of Pipeline Safety requires that the operation and maintenance plan, which pertains to the entire length of the pipeline, be submitted by the pipeline company to the Department of Transportation.

MS. PAGE questioned the recourse in terms of a spill. **Mr. Ring** explained that when the Express Pipeline was certified, they used the federal DOT requirements that stated that a spill contingency plan needed to be submitted to meet federal regulations. The DEQ added to these regulations. The MFSA requirements would apply to all lands.

MR. SORENSEN questioned the review of public necessity versus economic factors. **Mr. Egenhoff** maintained that if the necessity of the project is called in question during the NEPA process, they review the purpose and need of the project. As a matter of general policy, the project would need to benefit the public to rationalize the use of federal lands. Special use permits cannot be granted simply because they offer the holder a way to maximize their economic impact. There needs to be benefit to the public or federal resources.

MR. EBZERY inquired whether federal approval would constitute meeting a need for exercising eminent domain under the state statute. **Mr. Ring** remarked that in the instance of a pipeline company, there was a condemnation proceeding held in District Court in Billings. The court found that the pipeline company had not shown need. There was an out-of-court settlement, and the project moved forward.

Mr. Egenhoff clarified that the Federal Energy Regulatory Commission (FERC) has the general authority for all federal permitting and they issue a certificate of need for gas pipelines.

Art Compton, DEQ, explained that the need determination under the MFSA only remains for linear facilities. This need determination is generally for electric transmission facilities and addresses loads and resources in a regulated utility framework. For a pipeline facility, the state determination of need would review the information provided with responsibility and infrastructure necessary to serve the load.

REP. GILLAN questioned who would have jurisdiction for enforcement of mitigation measures. **Mr. Ring** remarked that in some cases, no one would have jurisdiction. The project sponsor oftentimes will view the mitigation measures as the right thing to do.

REP. GILLAN questioned what would trigger the use of a bond. **Mr. Ring** explained that under the MFSA the DEQ could require that mitigating measure be applied. For projects that do not fall under the MFSA, there are isolated permits but no comprehensive review of the entire project.

Jay Waterman, Montana Power Company (MPC), commented that MPC has approximately 2,000 miles of high-pressure natural gas transmission line in Montana. They vary from 2 inches to 20 inches in diameter. The MPC serves 125 communities with natural gas, and this includes approximately 150,000 customers. Within recent years, they have added pipelines to serve growing loads. In 1999, they built a pipeline near Absarokee. This project was completed under authority of various permits for state waters that were crossed. Recently compression was added to their compressor stations near Cut Bank and also near Augusta. Both of these projects were subject to the air quality permitting requirements.

Since the MPC pipeline system does not cross state boundaries and is not an interstate pipeline, it is not regulated by FERC. For the natural gas system, the federal safety regulations are granted to the state. The Montana Public Service Commission has been granted the authority to enforce these safety regulations.

REP. TASH remarked that it was his understanding that the MPC had used eminent domain powers infrequently for natural gas easement acquisition. **Mr. Waterman** explained that the Blackfeet and Absarokee projects did not include any condemnation proceedings and the Missoula loop project involved one condemnation proceeding, which was settled early in the process.

REP. LINDEEN questioned if safety regulations were adequate for projects that did not fall under the MFSA. **Mr. Waterman** commented that the MPC gas transmission system does not have any projects that have fallen under the MFSA. Their projects are all built to the federal safety specifications.

Bud Anderson, Manager of Land Acquisition for MPC, remarked that the MPC tries to settle all negotiations without the use of eminent domain powers. A letter is sent to the landowners with a 90-day response window. If a response is not received, their attorneys then sent out a letter with a 30-day window. If response is still not received, they then retain outside counsel.

Mitigation Measures Directly Related to Eminent Domain

Mitigation is addressed in current law under the just compensation concept. If a condemnor does not mitigate the damage to the remainder of the property or the future uses of the property and does not compensate the landowner, the landowner has the ability to challenge the compensation offer. If the landowner prevails, the condemnor

pays costs and attorney fees. Other types of mitigation are addressed through the permitting process for certain types of projects. (Petesch, 2000). If there was additional damage to the property outside of the interest taken, this would result in an additional taking for which the landowner is entitled to receive compensation.

A Case Study of the Use of Eminent Domain

This case study was conducted at the request of the Subcommittee in an attempt to better understand the impacts that projects, which could potentially be completed with the use of condemnation or eminent domain, have on property owners. The information provided in this summary is provided in an attempt to better understand public sentiment on eminent domain laws. The information provided may not be statistically accurate.

The Montana Department of Transportation provided EQC staff with the mailing addresses of all the property owners that were directly impacted by the Forestvale Interchange Project. Staff, in conjunction with the Subcommittee, developed questionnaires that were sent to the property owners requesting feedback on how the property owners felt they were treated, the need for the project, and other issues related to the use of eminent domain. A total of 32 property owners received the questionnaires. Two property owners had 2 parcels affected, so the total number of parcels was 34. Sixteen questionnaires were returned for a total of 47.1%.

Figure 6. Montana Department of Transportation Case Study

The case study questionnaires were divided into three different types. This summary will provide results based on the particular questionnaire that was answered. Each of the three questionnaires was prefaced with a different statement. The cover letter that was sent with the questionnaires requested that the property owner choose the statement that most fit their situation and answer the questions on that questionnaire. The three statements were:

(1) I, or my representative, was able to negotiate a price for my property in a manner that was fair and satisfactory to me.

(2) I, or my representative, negotiated a price for my property because of the threat of court action.

(3) I, or my representative, was unable to negotiate a price for my property. The property was condemned, and the price I received was decided in court.

Summary of Results

Of the people who responded to the survey:

- 87.5% did not know that there was a legislative study being conducted on eminent domain.
- 62.5% felt they were treated average (3) or above by the entity trying to obtain the interest in their property.
- 62.5% felt that their experience with eminent domain laws was average (3) or above. 18.8% felt that their experience was excellent (5). 25% felt that their experience was poor (1).
- 75% did not consider going through the court system and condemnation proceedings, and 18.8% did consider going through the court system.
- 62.5% were told of possible condemnation (ranked 3-5), by the project representative, prior to the beginning of negotiations. 31.3% were not told of possible condemnation.
- 43.8% were told of possible condemnation during the negotiation process (ranked 3-5). 37.5% were not told of possible condemnation.
- 12.5% were told of possible condemnation after the negotiation process (ranked 3-5). 75% were not told of possible condemnation.
- 25% did not feel that the use of eminent domain laws differed between private and state entities. 62.5% did feel that the use differed.
- Of the interest taken in property, 31.3% was in fee simple, 25% was in an easement, and 43.8% was as a right-of-way.
- 68.8% did not have a choice in the type of interest taken, 18.8% did have a choice, 12.5% did not answer.
- 56.3% felt that the type of interest taken was appropriate. 25% felt that the type of interest taken was not appropriate.
- 87.5% felt average (3) or above that the project was necessary for public good. 12.5% felt that the project was not necessary.

Detailed Results

Staff did not receive any responses to Questionnaire #3, therefore, this summary addresses only Questionnaire #1 and Questionnaire #2.

Questionnaire #1 (Q1) and Questionnaire #2 (Q2) had the same content in regard to the questions that were asked. The only difference between the two questionnaires was the statement that began each worksheet. The data is provided below. The tables provide the number of responses in each category for Q1, Q2, and the total of the two combined.

Questionnaire #1 (Q1)
11 questionnaires received. (68.8% of questionnaires received)

I, or my representative, was able to negotiate a price for my property in a manner that was fair and satisfactory to me.

Questionnaire #2 (Q2)
5 questionnaires received. (31.2% of questionnaires received)

I, or my representative, negotiated a price for my property because of the threat of court action.

(1) Were you aware of the eminent domain study being conducted by the Montana Legislature prior to receiving this letter?

	NO	YES	No Answer
Q1	9 (81.8%)	1 (9.10%)	1 (9.10%)
Q2	5 (100%)	0 (0.00%)	0 (0.00%)
Total	14 (87.5%)	1 (6.30%)	1 (6.30%)

(2) Do you feel that you were treated fairly by the entity that was trying to obtain the interest in your property?

	NO 1	2	3	4	YES 5	No Answer
Q1	1 (9.10%)	1 (9.10%)	0 (0.00%)	1 (9.10%)	8 (72.7%)	0 (0.00%)
Q2	3 (60.0%)	0 (0.00%)	1 (20.0%)	0 (0.00%)	0 (0.00%)	1 (20.0%)
Total	4 (25.0%)	1 (6.30%)	1 (6.30%)	1 (6.30%)	8 (50.0%)	1 (6.30%)

(3) How would you rank your experience with eminent domain laws?

	POOR 1	2	3	4	EXCELLENT 5
Q1	3 (27.3%)	0 (0.00%)	2 (18.2%)	3 (27.3%)	3 (27.3%)
Q2	1 (20.0%)	2 (40.0%)	2 (40.0%)	0 (0.00%)	0 (0.00%)
Total	4 (25.0%)	2 (12.5%)	4 (25.0%)	3 (18.8%)	3 (18.8%)

(4) Did you consider going through the court system and condemnation proceedings?

	NO 1	2	3	4	YES 5
Q1	8 (72.7%)	0 (0%)	0 (0%)	1 (9.10%)	2 (18.2%)
Q2	4 (80.0%)	0 (0%)	0 (0%)	0 (0.00%)	1 (25.0%)
Total	12 (75.0%)	0 (0%)	0 (0%)	1 (6.30%)	3 (18.8%)

(5) Did the project representative inform you of possible condemnation <u>prior</u> to beginning negotiations?

	NO 1	2	3	4	YES 5	No Answer
Q1	3 (27.3%)	0 (0%)	1 (9.10%)	3 (27.3%)	3 (27.3%)	1 (9.10%)
Q2	2 (40.0%)	0 (0%)	0 (0.00%)	0 (0.00%)	3 (60.0%)	0 (0.00%)
Total	5 (31.3%)	0 (0%)	1 (6.30%)	3 (18.8%)	6 (37.5%)	1 (6.30%)

(6) Did the project representative inform you of possible condemnation <u>during</u> the negotiation process?

	NO 1	2	3	4	YES 5	No Answer
Q1	5 (45.5%)	2 (18.2%)	0 (0.00%)	0 (0.00%)	3 (27.3%)	1 (9.10%)
Q2	1 (20.0%)	0 (0.00%)	1 (25.0%)	1 (25.0%)	2 (50.0%)	0 (0.00%)
Total	6 (37.5%)	2 (12.5%)	1 (6.30%)	1 (6.30%)	5 (31.3%)	1 (6.30%)

(7) Did the project representative inform you of possible condemnation <u>after</u> the negotiation process?

	NO 1	2	3	4	YES 5	No Answer
Q1	9 (81.8%)	0 (0%)	0 (0.00%)	0 (0%)	0 (0.00%)	2 (18.2%)
Q2	3 (60.0%)	0 (0%)	1 (25.0%)	0 (0%)	1 (25.0%)	0 (0.00%)
Total	12 (75.0%)	0 (0%)	1 (6.30%)	0 (0%)	1 (6.30%)	2 (12.5%)

(8) Do you perceive that the use of eminent domain laws differs between private entities and government entities exercising the right?

	NO 1	2	3	4	YES 5	No Answer
Q1	2 (18.2%)	0 (0%)	3 (27.3%)	3 (27.3%)	2 (18.2%)	1 (9.10%)
Q2	2 (40.0%)	0 (0%)	0 (0.00%)	0 (0.00%)	2 (50.0%)	1 (11.1%)
Total	4 (25.0%)	0 (0%)	3 (18.8%)	3 (18.8%)	4 (25.0%)	2 (12.5%)

(9) What type of interest was taken in your property?

	Fee Simple	Easement	Right-Of-Way	Other
Q1	3 (27.3%)	4 (36.4%)	4 (36.4%)	0 (0%)
Q2	2 (40.0%)	0 (0.00%)	3 (75.0%)	0 (0%)
Total	5 (31.3%)	4 (25.0%)	7 (43.8%)	0 (0%)

(10) Did you have a choice in the type of interest taken?

	No	Yes	No Answer
Q1	7 (63.6%)	3 (27.3%)	1 (9.10%)
Q2	4 (80.0%)	0 (0.00%)	1 (11.1%)
Total	11 (68.8%)	3 (18.8%)	2 (12.5%)

(11) Do you feel that the type of interest taken was appropriate?

	NO 1	2	3	4	YES 5
Q1	2 (18.2%)	0 (0%)	3 (27.3%)	0 (0%)	6 (54.5%)
Q2	2 (50.0%)	0 (0%)	0 (0.00%)	0 (0%)	3 (60.0%)
Total	4 (25.0%)	0 (0%)	3 (18.8%)	0 (0%)	9 (56.3%)

(12) Do you feel that the project, by which you were affected, was necessary for public good?

	NO 1	2	3	4	YES 5
Q1	0 (0.00%)	0 (0%)	1 (9.10%)	3 (27.3%)	7 (63.6%)
Q2	2 (50.0%)	0 (0%)	0 (0.00%)	0 (0.00%)	3 (60.0%)
Total	2 (12.5%)	0 (0%)	1 (6.30%)	3 (18.8%)	10 (62.5%)

(13) Please add any additional comments that you may have in reference to Montana's eminent domain laws.

Questionnaire #1

- Right of way purchaser was untrue in his statements in regard to the Gun Club purchase. We should have waited for their appraisal.
- Have questions regarding Montana Power and their ways regarding easement rights!
- Entire process handled with professionalism and courtesy.
- No, I don't feel it was fair. I had no choice or say in what was taking place.

Questionnaire #2

- I question the way the establishment of a price has evolved. Now an attorney seems to be necessary in order to get a fair price. Seems to be an unnecessary expense. How about a pair of dice?
- My complaint in this transaction is that it puts my house (and my bedroom) all too close to a very busy highway. This was not taken into consideration. It also puts my yard and garage access at risk. In this instance I feel, since I didn't know of this project when I purchased, that the whole property should have been purchased. It has created undue stress.

- I believe that eminent domain laws are okay. Except the Montana Department of Transportation should not be allowed to have their own appraiser to fix the value of the land they take. The Department should hire a professional land appraiser for this purpose. I believe I was robbed of approximately $80 – 100,000.

REFERENCES

Egenhoff, 1999. Panel Discussion, December 1, 1999, Eminent Domain Subcommittee Minutes

Petesch, 2000. Eminent Domain Subcommittee Minutes, April 12, 2000.

Ring, 1999. Panel Discussion, December 1, 1999, Eminent Domain Subcommittee Minutes

Springer, 2000. Personal Communications.

Chapter 6: Types of Interest Taken Whether by Condemnation or Negotiation

Types of Interest That May be Taken

There are three general types of interest in property that may be taken in a condemnation action. These are fee title interest, easement, and right-of-way. Each of these types are outlined below. The interest that the condemnor has requested in the condemnation complaint may not be the interest allowed in the taking. If the condemnor wishes to have an interest greater than an easement, the condemnor must prove the need for this greater interest to the court. As outlined in section 70-30-206, MCA, the court has the power to limit the interest in real property sought to be taken if in the opinion of the court the interest sought is not necessary.

Easement

An easement is an interest in land owned by another person, consisting in the right to use or control the land or an area above or below it for a specific limited purpose. Land benefitting from an easement is called the dominant estate. Land burdened by the easement is called the servient estate. Easements may last in perpetuity. Easements do not give the holder the right to possess, take from, improve, or sell the land.

60-1-103, MCA, defines "easement" for highway purposes as:

> "Easement" means a right acquired by public authority to use or control property for a designated purpose.

The legal definition of dominant and servient estate is also found in Montana statutes. In this case, estate and tenement have the same meaning.

> **70-17-103. Dominant and servient tenement.** The land to which an easement is attached is called the dominant tenement. The land upon which a burden or servitude is held is called the servient tenement.

The general rule applied to legal questions concerning the maintenance of easements states that the dominant estate or tenement is responsible for maintaining the easement.

The primarily recognized uses of easements are:

- a right-of-way;
- a right of entry for a purpose relating to the dominant estate;
- a right to the support of land and buildings;
- a right to light and air;

- a right to water;
- a right to engage in some act that would otherwise be defined as a nuisance; and
- a right to keep or place something on the servient estate.

Within the general definition of an easement, there are specific definitions that apply.

Easement in Gross

An easement in gross is an easement that benefits a particular person and not a particular piece of land. The beneficiary does not usually own any land adjoining the servient estate. This condition is most usually found in cases in which an entity has acquired an easement for a public use such as a fiber-optic cable, pipeline, or electrical transmission line.

Appurtenant Easement

An appurtenant easement is an easement that is created to benefit another tract of land, the use of the easement being incident to (dependent upon or subordinate to) the ownership of the other tract.

Fee Simple Title

Fee simple title is an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.

Fee Simple Absolute

An estate of indefinite or potentially infinite duration. This means an ownership interest in property that is free from any conditions or limitations.

70-15-203. Fee simple. Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

Right-of-Way

Right-of-way is: (1) A person's legal right, established by usage or contract, to pass through property owned by another; or (2) the right to build a railroad or highway on property owned by another.

A right-of-way is an easement or it can be a strip of land owned in fee title.

60-1-103, MCA, defines "right-of-way" for highway purposes as:

> "Right-of-way" is a general term denoting land, property, or any interest in land or property, usually in a strip, acquired for or devoted to highway purposes.

Use of Interest Taken Through Condemnation Actions

The type of interest taken has an impact on what the condemnor can do with the section of land that has been taken. If the interest taken was fee simple title, the condemnor can do whatever the condemnor wants with the property once the public use for which the property is acquired has been completed or abandoned. The condemnor can resell or lease any portion of it without compensation to the original landowner. However, if the interest is something other than fee simple, there are other issues to discuss. The term that has been used when discussing the leasing or resale of portions of an interest taken has been the "multiple use of easements".

Multiple use of easements does not have a specific legal definition. The common meaning prescribed to multiple use is two or more activities (or public uses) sharing a common easement. It is assumed that the public uses are compatible and that one would not infringe upon the operation of the other.

Since "easement" is defined as a right acquired by public authority to use or control property for a designated purpose, each purpose or public use must be defined within a "multiple use easement" agreement.

There are three main points to address when discussing the multiple use of easements.

Can the entity holding the easement legally resell or lease a portion of that easement to a different entity or use?
The easement agreement is the document that would define whether a portion of an easement may be resold or leased for additional uses. If the agreement is broad and allows for the renting or sale of additional uses on the easement, then the entity that originally purchased the easement may legally complete these transactions.

Is the landowner who originally owned the land entitled to additional compensation?
Whether or not the original landowner is entitled to additional compensation is also determined by the easement agreement. It all depends on the easement agreement language and what was decided during negotiations. If the easement agreement does not have language in it stating that the original landowner is entitled to additional compensation, the easement holder is not legally responsible for paying the landowner. However, if the easement agreement does state that any additional uses must compensate the original landowner, then it is the original landowner's responsibility to ensure payment. Again, this question is generally answered by the terms of the easement agreement. It may also be determined by whether the subsequent use burdens the servient tenement (surface owner).

Does multiple use of easements have environmental benefits or implications?
The multiple use of easements goes beyond the question of compensation and the reselling of easement rights. In a discussion about multiple use, one must also address the potential environmental effects and impacts of having multiple easements as opposed to one easement with multiple uses.

An example of having one easement with multiple uses is utility corridors. A "utility corridor" is a strip of land that is under easement and that holds more than one type of product or has more than one entity occupying it. For instance, a utility corridor could hold fiber-optic cable, telephone cable, etc. By putting all of these different "uses" into one trench or at least one easement, the cumulative impact to the environment and to the surface owner is minimized. Consider what would happen if there were three different utility companies that wanted to lay lines through a piece of property. If they were not allowed to share an easement, that would be three separate easements, trenches, construction areas, and reclamation activities. However, if the companies were allowed to share an easement, there would potentially be less of an impact to the environment by limiting the amount of ground disturbed. In the instance of a surface owner who is farming the acreage, the benefit would be seen through less total land area being disturbed both during construction and in the event of maintenance and repair.

The concept of having more than one use within an easement is addressed in statute. Section 69-4-101, MCA, states that:

> . . . a telegraph, telephone, electric light, or electric power line corporation or public body or any other person owning or operating such is hereby authorized to install its respective plants and appliances necessary for service and to supply and distribute electricity for lighting, heating, power, and other purposes *and to that end, to construct such telegraph, telephone, electric light, or electric power lines, from point to point, along and upon any of the public roads, streets, and highways in the state, by the erection of necessary fixtures, including posts, piers, and abutments necessary for the wires.* The same shall be so constructed as not to incommode or endanger the public in the use of said roads, streets, or highways, and nothing herein shall be so construed as to restrict the powers of city or town councils. (emphasis added).

With regard to pipelines, section 69-13-103(1), MCA, explicitly states that included with the right to lay pipelines is:

> the right to lay, maintain, and operate pipelines, *together with telegraph and telephone lines incidental to and designed for use only in connection with the operation of such lines*, or along, across, or under any public stream or highway in this state is hereby conferred upon all persons, firms, limited partnerships, joint-stock associations, or corporations coming within any of the definitions of common carrier pipelines as hereinbefore made.

> This right to run along, across, or over any public road or highway, as provided for, can only be exercised upon condition that the traffic thereon not be interfered with and that such road or highway be promptly restored to its former condition of usefulness. The restoration of the road or highway is subject also to the supervision of the county commissioners of the county in which said highway is situated. (emphasis added).

This statute was reaffirmed in Cenex Pipeline LLC., v. Fly Creek Angus, Inc., 1998 MT 334, 292 Mont. 3000, 971 P.2d 781 (1998). In this case, one of the six issues that Fly Creek presented on appeal to the Supreme Court was that condemnation for a fiber-optic line was not addressed in the condemnation complaint.

The issue addressed whether or not the District Court erred in allowing the condemnation of the land in question for the laying of a fiber-optic line. Under section 69-13-103, MCA, a common carrier pipeline, such as Cenex, has the right to lay telecommunications lines along a pipeline if the telecommunications lines are designed to be used in connection with the operation of the pipeline. The issue raised by Fly Creek was that Cenex had, at one point, stated that they were not planning on laying a fiber-optic cable to be used in conjunction with the pipeline. The Supreme Court upheld the District Court decision by looking at the full context of the project, including the fact that the possibility of installing fiber-optic cable "may be considered prior to actual construction". Given that, the Supreme Court ruled that the condemnation was valid on this issue.

The eminent domain statutes themselves also address the possibility of uses overlapping. Section 70-30-111(3), MCA, states that as part of the facts necessary to be found before condemnation, the condemnor must show that if the property is already appropriated to some public use, the public use to which it is to be applied is a more necessary public use. Therefore, if the court finds the new public use to be more necessary, then the new public use project may be undertaken within the previous easement.

One of the challenges associated with utility corridors is faced by the entities whose lines, pipe, etc., are installed. This challenge is in repairing and improving the entity's particular asset without damage to the other assets held in that easement or trench. The other challenge is the types of assets that can feasibly be contained in the same easement or area. For example, generally, electric lines and gas or oil pipelines are not contained in the same easement because of safety concerns. In this case, the sharing of an easement is not feasible.

In conclusion, there are many different elements to consider when discussing the multiple use of easements. The importance of these factors must be weighed against each other for a conclusion to be achieved.

Possession of Property by Plaintiff

Eminent domain actions inherently include the transition of property from the condemnee to the condemnor. However, when does possession of the property change hands from the condemnee to the condemnor? Possession of the property is specifically addressed in section 70-30-311, MCA. Before any decisions can be made in regard to the adequacy of the current policy, that current policy must be understood. This part describes the current process that is allowed for possession of the property to be taken by the plaintiff.

When can the condemnor take possession?
The condemnor can take possession:

- any time after the filing of the preliminary condemnation order;
- after the report and assessment of the commissioners;
- before or after appeal from the commissioner's assessment; and
- before or after appeal from any other order or judgment in the proceedings.

How does the condemnor take possession?

- The condemnor makes an application to the court.
- The court has the power to order the following:

1. If the condemnor is already in possession of the property, the condemnor may continue possession.
2. If the condemnor is not in possession of the property, the condemnor may take possession of the property, remain in possession of the property, and use the property until the final conclusion of the proceedings and litigation.

Is the condemnor required to provide compensation before taking possession?
Before the condemnor can take possession of the property, the condemnor must deposit compensation with the court. If the condemnee has filed a statement of claim with the court, according to section 70-30-207, MCA, the amount deposited must meet the sum identified in the statement. If the commissioners or jury have assessed an amount for just compensation, the amount deposited must meet this assessment.

If the condemnee fails to file a statement of claim within the 30 days allowed in section 70-30-207, MCA, the condemnor may obtain an order for possession, with the condition that the condemnor's payment into the court must be made within 10 days after receiving the condemnee's statement of claim.

Article II, section 29, of the Montana Constitution states that "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss having been first made to or paid into court for the owner." Therefore, once just compensation has been paid--into the court or otherwise--the condemnor may, if authorized by the court, take possession of the property.

Are there other payments or securities that may be required?
If the condemnee appeals, the court may require the condemnor to give bond or sureties

to pay the condemnee any additional damages or cost over and above the amount assessed for the taking of the property. These bonds and/or sureties would also cover all damages that the condemnee may sustain if the property in question is not taken for public use.

The court must approve these bonds and/or sureties as well as determining their sum.

What is considered just compensation?
The amount assessed by the commissioners or by the jury on appeal is considered, until reassessed or changed in further proceedings, as just compensation for the property appropriated.

Does payment into court by the condemnor or withdrawal of funds from the court by the condemnee preclude any further legal proceedings?
The condemnor, by paying into the court the amount claimed in the answer or the amount assessed or by giving security, may not be prevented or precluded from appealing the assessment. The condemnor may appeal in the same manner and with the same effect as if money had not been deposited or security given.

In all cases in which the condemnor deposits the amount of the assessment and continues in possession or takes possession of the property, the condemnee, if there is no dispute as to the ownership of the property, may at any time demand and receive upon order of the court up to 75% of the deposited money. The condemnee, by making a demand, is not barred or precluded from the right of appeal from the assessment.

Is the use of the money demanded from the court limited?
The condemnee may appeal from an assessment. However, if the amount of the assessment is reduced on appeal, by either party, the condemnee who has received all or any part of the amount deposited is liable to the condemnor for any excess of the amount received by the condemnee over the amount finally assessed. Legal interest will be applied for any excess received by the condemnee from the time the condemnee received the money. The legal interest may be recovered through court action. The jury, upon appeal from the assessment of the commissioners, may find a less amount, as well as an equal or greater amount, than that assessed by the commissioners.

How much of the deposit into the court may the defendant withdraw?
The court may not order the delivery to any condemnee of more than 75% of the money deposited on the condemnee's account unless the condemnee posts a bond equal to the amount in excess of 75%, with sureties to be approved by the court. This bond would be used to repay the condemnor those amounts that are withdrawn that are in excess of the final award in the proceedings.

Panel discussion on possession of property by the plaintiff

The Subcommittee heard about how the possession of property in eminent domain actions impacts the various affected parties. The panel consisted of Ms. Jeanie

Alderson, Northern Plains Resource Council; Mr. Nick Rottering, Montana Department of Transportation; Mr. Leo Berry, Browning, Kaleczyk, Berry, and Hoven--representing private entities with condemnation authority; and Mr. Mike Meuli, Montana Stockgrowers Association--representing private landowners.

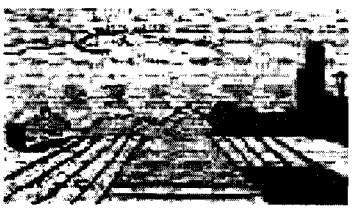
The points that panel members were asked to address are outlined below.

- Is the current process for possession of property adequate for you or those that you represent? If so, why? If not so, why?
- Do you think that the current process is as fair as the process can get?
- Do you think that changes could be made to make this process better for all involved? If so, what changes?
- How would it affect you or those that you represent if the plaintiff was not allowed to take possession of the property until all court proceedings were exhausted?
- Any additional comments.

Ms. Jeanie Alderson, Northern Plains Resource Council

Ms. Alderson stated that she is a rancher and adult education instructor. The current process of putting plaintiffs into possession is not adequate for farmers and ranchers primarily because of the imbalance in the system. The state and large companies with very deep pockets are usually the entities that condemn. Montana's farmers and ranchers are the ones most likely to be condemned. Landowners are never on a level playing field in this process. Property rights are taken away from landowners too soon. Possession can occur before a judge's appointed condemnation commissioners have examined the property and given a recommendation to the court on the issue of compensation. This also occurs before a trial is completed and a jury composed of the landowner's peers has determined just compensation. The taking of property should not take place until the entire condemnation process is complete. What other civil or criminal trials are there where the judgment of the award is given to the plaintiff before the completion of a jury trial?

"PROPERTY RIGHTS ARE TAKEN AWAY FROM LANDOWNERS TOO SOON."



The current eminent domain process is as good as is possible for the condemnor. The process is designed to facilitate the taking of private property. The process needs to be as fair as possible. Changes that need to be considered include: (1) possession should be prevented until all legal avenues are exhausted or at least further along in the condemnation process; (2) a jury trial should be required on the preliminary condemnation order; (3) all Montana Environmental Policy Act (MEPA) proceedings should be completed before possession. What good is an environmental impact statement (EIS) or environmental assessment (EA) that evaluates alternatives or mitigations after the project is under construction?

If the plaintiff was not allowed to take possession until after all court appeals were exhausted, the rights of landowners to use and enjoy private property would be recognized. This would put landowners on a more equal footing and allow for a position of strength instead of the current position of weakness. Currently the landowner knows that the landowner's property will be taken and there is nothing that can be done about it.

Mr. Leo Berry, Private Entity With Condemnation Authority
Mr. Berry maintained that eminent domain and private property ownership are part of our governmental process. There are certain inherent rights that the government retains and one of those is eminent domain. Our ability to own private property is subject to that inherent governmental authority to act on behalf of the public good. This is a public policy decision to be made by the Legislature. The principle of eminent domain is necessary for us to exist as a society. Due process and compensation need to be provided. The law could be made more readable without changing the law.

The eminent domain process is not unfair because the condemnation process cannot begin until negotiations have been held with the landowner. Proof needs to be submitted in the complaint that an offer was made to secure the easement across the property. The landowner needs to reject the offer before the condemnation process can begin. After the complaint is filed, the judge reviews whether the condemnation meets the public purpose criteria. The only thing remaining to be determined is the amount of compensation for the property. There is no real reason to stop the possession of the property at that point. The appeals process can take many years. This would place the landowner in a superior position in terms of bargaining with the project proponent. Contrary to public interest, one landowner may be able to hold up a project.

"THE EMINENT DOMAIN PROCESS IS NOT UNFAIR BECAUSE THE CONDEMNATION PROCESS CAN NOT BEGIN UNTIL NEGOTIATIONS HAVE BEEN HELD WITH THE LANDOWNER."

The code does not address the situation when an appeal is made to the Supreme Court and the Supreme Court determines that the District Court erred in determining that the public purpose criteria had not been met. The District Court may require a bond or that the amount of money be placed in an account for the landowner.

Mr. Mike Meuli, Montana Stockgrowers Association
Mr. Meuli stated that from an agricultural landownership perspective, land is not viewed as only a possession to be sold for just compensation, it is a personal possession to be valued and passed onto future generations. This attachment to the land is often overlooked by the rest of our society. A division of the property can seriously affect the business operation and cause problems not considered in the compensation issue. If there was consideration of the property rights, the compensation issue could be settled much easier. Property rights are the foundational basis for every freedom enjoyed in this country. Often changes burden the agricultural operation in ways the landowner

was unaware of during the process. Just compensation is usually not equal to "x" number of acres times a fair market value. There are new fences to maintain, irrigation systems that do not fit on a divided property, etc. These situations may affect an operation forever. Compensation should be based on the cost of living with the changes.

The law is necessary and addresses the goal of meeting the needs of the public. The law is often applied unfairly from the landowner's point of view. Oftentimes the compensation and consideration of the rights of the landowner are not considered.

When possession is taken prior to the conclusion of the process, the landowner is placed in a much weaker position. Landowners may be willing to forego the condemnation battle if they trusted that the commissioners would take into consideration the items that have previously been overlooked.

Any look at eminent domain needs to place the private property rights as the highest consideration in any of the decisions that are made.

Mr. Nick Rottering, Montana Department of Transportation (MDOT)
Mr. Rottering maintained that the MDOT is only interested in acquiring land for highway purposes. Procedures have been adopted to work with the cumbersome statutes. Public policy questions should be left to the Legislature.

Six elements must be used by the court to arrive at "necessity" if the process is contested. The present process is a legal determination by the court. The MDOT operates under specific statutes found in Title 60. The administrative order issued by the Department creates a presumption in its favor that it has necessity. This presumption is rebuttable by the landowner. After the six elements are proved to arrive at necessity, a preliminary order of condemnation must be addressed. In order to arrive at a preliminary order, either the landowner needs to stipulate to the order or the last written offer of the amount of compensation is deposited with the court. If the landowner objects, a value commission will be set up to arrive at value before the preliminary order of condemnation is obtained. If a case of just compensation needs to be tried to a jury, the MDOT does not have a preliminary order of condemnation.

The process is as fair as it can be. The statutes are cumbersome and require a tremendous amount of due process. The due process is geared to the private landowner who has the constitutional protection that his or her property cannot be taken without due process.

REP. SCHOCKLEY questioned whether a private condemnor should be able to take immediate possession of property before the appeals process has been exhausted. This is a benefit not available to parties in most lawsuits. This presumes that the private condemnor is not going to lose the lawsuit. **Mr. Berry** maintained that it is not unusual in a civil proceeding to have a separation between determination of liability and determination of damages. This is quite often decided at separate times by separate

juries. There is an outside possibility that the Supreme Court could reverse a District Court decision. This happens very infrequently. This risk needs to be compared to the probability that substantial delay will take place because one individual landowner places himself in a superior position to the public good. The Legislature has already made the determination as to which projects are for the public good.

REP. SHOCKLEY maintained that in most civil proceedings the winning party is not given possession of the property until the case is resolved on appeal. In the first nine months of l999, the Supreme Court reversed in part or remanded to the District Court 52% of the cases. **Mr. Berry** emphasized that the distinction is that this process has been established as the state's power. Other civil cases would not have a public policy determined by the Legislature as a public use.

REP. SHOCKLEY saw a distinction between a governmental entity and a private entity in the eminent domain process. **Mr. Berry** maintained that this decision was made by the Legislature.

Mr. Alke remarked that the necessity hearing does not determine the necessity of the underlying project because that is taken from the list created by the Legislature. The necessity hearing determines whether it is necessary to take that particular piece of property for the underlying project. He represented a client against the MDOT and won the case. They proved that the landowner's property was not necessary for the highway project. The district judge makes a factual determination as to whether the property is necessary for the project.

REP. MCGEE asked **Mr. Meuli** his view on how the process could be more fair. **Mr. Meuli** remarked that once possession is taken the landowner is left in a much weaker position regarding issues that were not considered in the original offer.

REP. MCGEE asked **Ms. Alderson** if issues other than compensation had been negotiated in her case. **Ms. Alderson** explained that they have not entered into negotiations at this time. She added that the burden of proof is always placed on the landowner. There are some things for which the landowner cannot be compensated.

REP. MCGEE questioned whether monies were paid to the individual before possession was taken. **Mr. Berry** clarified that the funds are placed in an account or paid to the condemnee prior to taking possession.

The panel discussion outlined above was held during the January meeting of the Subcommittee. The discussion at the January meeting was cut short due to the public hearing. To allow the discussion to continue related to possession of property by the condemnor, the panel was invited to participate in the February meeting of the Subcommittee. Outlined below is the discussion from the February meeting panel discussion.

Mr. Nick Rottering, Montana Department of Transportation (MDOT), noted that the MDOT needed possession earlier than other private entities because they need to certify that the project is ready for bid letting. They need to show ownership to be able to gain access to federal highway appropriations. If the DOT couldn't take possession until after the issue of just compensation was decided, highway projects could be delayed for 2 to 3 years.

Steve Wade, Burlington Northern, maintained that the plaintiff should be able to take possession of the property once the judge has made the determination that the requirements for condemning a property have been met. Once this is established, the compensation issue is the only issue remaining.

Wally McRae, Northern Plains Resource Council, remarked that the MDOT may need possession sooner than a for-profit entity. It is too easy for a private entity to receive a permit to condemn. A private entity can condemn for a water storage reservoir. Low-quality water from the coal bed methane process is being discharged into the Powder River and the Tongue River. A private entity can impound this water. The rancher needs to be satisfied that this represents a public convenience and necessity. A special exception needs to be made for truly public uses.

REP. TASH stated that other states used utility corridors along with highway right-of-ways. He questioned whether this was under review in Montana. **Mr. Rottering** remarked that the MDOT Director has created a task force to include the utility industry and highway officials to study this situation. Certain utilities are able to occupy the right-of-way. The Department does not allow very many utilities to occupy interstate rights-of-way. These highways are access-controlled and any entry, without the Department's permission, is considered a trespass.

MR. SORENSEN questioned whether the panel members saw private uses that provided for the public interest as having the same rights as a use by the government. **Mr. Wade** related that if the criteria was met, it would not matter whether the entity were privately owned or a government entity. **Mr. McRae** noted that the problem is in the definition. Oftentimes private entities are able to receive a certificate that states they have met the criteria for public convenience and necessity. In many instances, he doesn't believe that to be the true situation. The Tongue River Railroad is a prime example.

REP. TASH asked whether private entities needed to meet the same test as public entities. **Mr. Wade** explained that the judge determines whether or not the action is for the public benefit. This is set out in statute.

MS. LEE noted that public uses are decided by the Legislature. Private entities act as an agent of the state. This is where they receive their authority.

MR. SORENSEN noted that in regard to the issue of possession of property by the plaintiff, no further information was needed.

Rights of Reentry

The right of an entity to enter upon property for which that entity holds an interest, commonly defined as the right of reentry, is not defined specifically within the eminent domain statutes. The laws delineating this right are found in Title 70, chapter 16, part 4, MCA. Title 70 deals with property, and chapter 16 addresses rights and obligations incidental to ownership in real property. Part 4 governs the right of reentry. Reentry is also addressed in Title 70, chapter 27, MCA.

Outlined below are the two statutes within Title 70, chapter 16, MCA, that address the right of reentry.

> **70-16-401. Reentry -- when and how to be made.** Whenever the right of reentry is given to the grantor or lessor in any grant or lease or otherwise, such reentry may be made at any time after the right has accrued, upon 3 days' notice, as provided in chapter 27.

An interpretation of section 70-16-401, MCA, results in the following determinations. First, the right of reentry must be given in the documents or agreements pertaining to the interest obtained in order for the entity to have the right of reentry. An example would be an utility easement. The easement agreement or paperwork would have to specifically give or grant the holder of the easement the right of reentry. For all practical purposes, it is probably safe to say that an agreement for an interest in property for uses associated with eminent domain would have language related to rights of reentry. Secondly, section 70-16-401, MCA, specifies that even with the right of reentry delineated in the agreement, the entity owning the interest in property must provide the servient tenement 3 days' notice before entry. Third, section 70-16-401, MCA, references chapter 27 of Title 70. Chapter 27 simply provides, under section 70-27-110, MCA, direction on how the notice is to be served.

> **70-16-402. Action for possession under right of reentry -- notice not required.** An action for the possession of real property leased or granted with a right of reentry may be maintained at any time in the district court, after the right to reenter has accrued, without the notice prescribed in 70-16-401.

This statute states that the 3-day notice need not be given if the right of reentry is maintained at any time in the District Court.

The right of reentry may also be addressed as a secondary easement. In Laden v. Atkeson, 112 Mont. 302, 116 P.2d 881 (1941), the Montana Supreme Court defined an easement as a right of one person to use the land of another for a specific purpose or a servitude imposed as a burden upon land. The Court gave the example of an easement in a ditch through another's land. The Court also noted that the right to enter upon the servient tenement for the purpose of repairing or renewing an artificial structure, constituting an easement, is a secondary easement. A secondary easement

is a mere incident of the easement that passes by an express or implied grant or that is acquired by prescription. Therefore, the person having an easement in a ditch running through the land of another may go upon the servient tenement and use as much of the land as is required to make necessary repairs and to clean the ditch at reasonable times. A secondary easement lacks the precision of the easement to which it is attached. The Laden court stated "Omniscient or occult indeed would be the vision of the court that could foresee the precise amounts of land to be needed for repairs and maintenance along the ditches by plaintiffs in the future." The secondary easement may be exercised only when necessary and in a reasonable manner that does not needlessly increase the burden on the servient tenement. If the holder of an easement exceeds the holder's rights or enters upon or uses the land of the servient tenement for unlawful purposes, the easement holder is guilty of a trespass and the servient tenement owner may maintain an action for trespass. The servient tenement owner is entitled to damages for an abuse of the easement rights.

EMINENT DOMAIN IN MONTANA'S FUTURE

Chapter 7: Where Do We Stand? EQC Findings and Recommendations

Key Findings and Recommendations of the HJR 34 Study

Figure 7. Findings and Recommendations Matrix

Work Plan Task	Findings	Final Recommendations	Comments
Entities Authorized to Exercise Right of Eminent Domain	The current law is adequate.	Make no changes to current law.	
Federal/ State Relationship	The current law is adequate.	Make no changes to current law.	
Reversion of Property	The current law is adequate.	Make no changes to current law.	

Work Plan Task	Findings	Final Recommendations	Comments
Mitigation Measures	**1**-During public hearings, some property owners have expressed concern with the ability to negotiate mitigation measures within the context of the eminent domain process. **2**-The landowner has the responsibility and legal recourse to negotiate a settlement and mitigation measures. **3**-Article II, section 29, Montana Constitution, states "Private property shall not be taken or damaged for public use without just compensation to the full extent of the loss	**1**-Address the fact that the landowner has the responsibility and legal recourse to negotiate a settlement and mitigation measures in the Eminent Domain Handbook. **2**-The EQC proposes statutory language allowing the condemnee and condemnor in a condemnation action the opportunity to provide a statement of appropriate damage reduction measures; allowing the court to include appropriate payment for damages in the preliminary condemnation order; and allowing for the inclusion of appropriate payment for damages in the final condemnation order. (LC0164)	One of the 11 Eminent Domain Subcommittee members stated that landowners expressed concern about being locked out of routing and siting decisions and not being able to enforce mitigation measures already included in contracts and condemnation orders. Landowners said there appeared to be a double standard when projects cross both public and private land.
Possession of Property	**1**-The Montana Constitution states that the condemnor may take possession of the property, at the discretion of the court, upon payment to the condemnee or payment into the court of the amount claimed by the condemnee in the condemnee's claim of just compensation.	Make no changes to current law.	

Work Plan Task	Findings	Final Recommendations	Comments
Liability	The public has expressed concern regarding the property owner's potential liability in association with projects installed in easements on their property through the use of eminent domain.	Incorporate liability language into the eminent domain statutes. Such as: A Bill for an Act entitled: "An act limiting the liability of a property owner whose property is taken by eminent domain to instances of negligence or intentional conduct; providing for indemnification for costs and attorney fees for a property owner who is made party to an action but is not found liable for damages." (LC0161)	
Due Process	The current law is adequate.	Make no changes to current law.	
Burden of Proof	The issue of "clear and convincing evidence" standards was discussed in Subcommittee meetings.	After receiving public comment: Make no changes to the current law, leaving the burden of proof for the condemnor at preponderance of the evidence.	
Rights of Reentry	The current law is adequate.	Make no changes to current law.	

Work Plan Task	Findings	Final Recommendations	Comments
Use of Interest Taken	**1**-The current law needs clarification. **2**-The current law is not well-understood.	**1**-Include discussion of use of interest taken in the Draft Eminent Domain Handbook. This section should state that the condemnor may take property only for the public use specified in the condemnation order.	Four members of the 11-member Eminent Domain Subcommittee believe that the Montana statutes and court decisions already limit the uses that a condemnor can apply to the interest taken. Draft legislation (McGee) would have allowed the District Court, in the preliminary condemnation order, to delete other uses that are required for the critical and necessary operations of the stated public use contained in the condemnation complaint. The draft legislation would have taken takes a step backward and could seriously frustrate economic development activity involving technology. * The full EQC voted not to request this legislation.
Public Uses	The Legislature is solely responsible for delineating "public use".	Make no changes to current law.	

Work Plan Task	Findings	Final Recommendations	Comments
Type of Interest Taken	**1-**The interest in property taken is limited to an easement unless the condemnor proves in court that a greater interest is necessary. **2-**The current law is adequate, but unclear.	The EQC proposes statutory language to clarify the statute. (LC0163)	Two of the 11 Eminent Domain Subcommittee members believe that a presumption that an easement is sufficient may not be in the best interests of a landowner (condemnee) and that it may limit the ability to negotiate with the condemnor. This may result in unintended consequences. Handbook clarification is adequate.
Just Compensation	The current law is adequate.	Make no changes to current law.	
Handbook	Montana's eminent domain laws are not well-understood.	Write a Draft Eminent Domain Handbook for educational purposes.	

Work Plan Task	Findings	Final Recommendations	Comments
Necessity/ Public Interest	**1**-Public interest is not specifically defined in statutes governing eminent domain. **2**-Public opinion indicates there is clear disagreement over the issue of public interest.	Make no changes to current law.	Three of the 11 Eminent Domain Subcommittee members stated that landowners have expressed concern that in some cases, they may be forced to give up property rights for projects that are not in the public interest and felt that public interest should be determined before private condemnors can use eminent domain.
Eminent Domain Statutes in General	The statutes are generally hard to interpret and understand. There are references to eminent domain located throughout the code.	If legally possible, consolidate all eminent domain statutes in code such that the statutes are located in one section of code or that references are given in code to other sections of code dealing with relevant matters of eminent domain. Clarify current statutory language when possible, except when language must be maintained as is due to established legal precedent. (LC0162)	

Is eminent domain being implemented in the best possible manner?

The EQC determined that eminent domain is being implement in the best possible manner with respect to the following elements:

- Entities authorized to exercise the right of eminent domain.
- Federal/state relationships in eminent domain actions.
- Reversion of property.

- Possession of property by the condemnor.
- Due process.
- Burden of proof in eminent domain actions.
- Rights of reentry.
- Use of interest taken.
- Public uses enumerated.
- Just compensation.
- Necessity and public interest.

Are the current eminent domain statutes adequate?

The EQC determined that the eminent domain statutes were adequate with respect to the following elements.

- Entities authorized to exercise the right of eminent domain.
- Federal/state relationships in eminent domain actions.
- Reversion of property.
- Possession of property by the condemnor.
- Due process.
- Burden of proof in eminent domain actions.
- Rights of reentry.
- Use of interest taken.
- Public uses enumerated.
- Just compensation.

Is there a need for revising the laws related to eminent domain?

The EQC recommends that the following parts of Montana's eminent domain laws be revised.

- Liability Associated With an Interest in Property Acquired through Eminent Domain Actions -- add liability language to statutes. (LC0161)
- Eminent Domain Statutes in General -- (1) clarify current statutory language; and (2) reference all areas of the MCA where relevant matters of eminent domain are located. (LC0162)
- Type of Interest Taken -- clarify in statute that an easement is the preferred interest to be taken in a condemnation proceeding unless the parties agree that a greater interest should be taken or the condemnor can show that a greater interest is necessary. (LC0163)
- Mitigation Measures -- allow the condemnor and the condemnee the opportunity to provide a statement of appropriate damage reduction measures and provide for the inclusion of the determination of appropriate payment for damages in the preliminary and final condemnation orders. (LC0164)

Is there a potential benefit of revising the laws related to eminent domain?

The EQC recommends that the following parts of Montana's eminent domain laws would benefit from revision or inclusion in the statutes.

- Liability Associated With an Interest in Property Acquired through Eminent Domain Actions -- add liability language to statutes. (LC0161)
- Eminent Domain Statutes in General -- (1) clarify current statutory language; and (2) reference all areas of the MCA where relevant matters of eminent domain are located. (LC0162)
- Type of Interest Taken -- clarify in statute that an easement is the preferred interest to be taken in a condemnation proceeding unless the parties agree that a greater interest should be taken or the condemnor can show that a greater interest is necessary. (LC0163)
- Mitigation Measures -- allow the condemnor and the condemnee the opportunity to provide a statement of appropriate damage reduction measures and provide for the inclusion of the determination of appropriate payment for damages in the preliminary and final condemnation orders. (LC0164)

Recommendations for Action by the Legislature

See **Volume II** for EQC proposed legislation with regard to Montana's eminent domain laws.

Recommendations for Action by the Executive Branch

The EQC did not recommend action by the Executive Branch with regard to Montana's eminent domain laws.

Recommendations for Action by the Environmental Quality Council

The EQC did not recommend additional action by the Environmental Quality Council with regard to Montana's eminent domain laws.

APPENDICES

APPENDIX I: HOUSE JOINT RESOLUTION NO. 34

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING THE LEGISLATIVE COUNCIL TO DESIGNATE AN APPROPRIATE INTERIM COMMITTEE TO STUDY USE OF THE POWER OF EMINENT DOMAIN AND THE EXISTING STATUTES RELATED TO EMINENT DOMAIN AND REQUIRING THAT COMMITTEE TO REPORT ON ITS FINDINGS AND RECOMMENDATIONS.

WHEREAS, eminent domain rights were first granted in 1877 for the development of utilities that served the public interest; and

WHEREAS, use of the power of eminent domain is not well-understood; and

WHEREAS, many landowners believe that their property rights are not protected by Montana's statutes governing eminent domain; and

WHEREAS, there are different rights and responsibilities associated with an easement in gross and an appurtenant easement; and

WHEREAS, options for expanding or limiting rights under easements are not effectively used; and

WHEREAS, the condemnation proceedings undertaken to exercise the power of eminent domain are intended to be a last resort for failed negotiations; and

WHEREAS, there were several proposals to the 56th Legislature to revise laws governing eminent domain.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That the Legislative Council be requested to designate an appropriate interim committee to:

(1) study implementation of existing eminent domain statutes, including the following:

(a) the frequency and distribution of condemnation actions in Montana;

(b) the types of interest in real property condemned in Montana; and

(c) the extent to which rights-of-way obtained through the use of eminent domain are being resold or re-leased for other uses than the original purpose for which the land was condemned and the degree to which the original landowner is compensated for those new uses; and

(2) study the adequacy of the current statutes with respect to the following specific aspects of use of the power of eminent domain:

(a) due process;

(b) just compensation;

(c) burden of proof standards;

(d) the abandonment process;

(e) rights of reentry;

(f) reversions;

(g) methods for acquiring property or the use of property, including types of easements and restrictions on easements;

(h) multiple use of easements; and

(3) determine the need for and potential benefit of revising the laws related to eminent domain.

BE IT FURTHER RESOLVED, that the committee is encouraged to:

(1) invite participation by and involvement of interested and knowledgeable persons including property owners, industry representatives, representatives of environmental organizations, and representatives of state and local government entities; and

(2) actively seek participation by citizens from all parts of Montana.

BE IT FURTHER RESOLVED, that the committee assigned to conduct the study shall report to the 57th Legislature, as provided in 5-11-210, on its findings and recommendations, including recommendations for legislation, if appropriate.

Appendix 2: Eminent Domain Study Interested Persons List

- ✗ **ALLEN AND ASSOCIATES**
  DON ALLEN
- ✗ **JEROME ANDERSON**
- ✗ **ANDERSON & BAKER LAW OFFICES**
  MARK BAKER
- ✗ **SW ALDERSON**
- ✗ **MARY ALDERSON**
- ✗ **MARY ALEXANDER**
- ✗ **AT&T**
  LJ GODFREY
- ✗ **ALICE AUSTIN**
- ✗ **AVISTA CORP**
  NEIL COLWELL
- ✗ **SEN. SUE BARTLETT**
- ✗ **SCOTT BLISS**
- ✗ **SEN. JOHN BOHLINGER**
- ✗ **BONES BROTHERS RANCH**
  JEANIE ALDERSON
- ✗ **BONNEVILLE POWER ADMINISTRATION**
  GAIL KUNTZ
- ✗ **REP. SYLVIA BOOKOUT-REINICKE**
- ✗ **BROWNING KALECZYC BERRY AND HOVEN**
  MARK TAYLOR
- ✗ **BROWNING KALECZYC BERRY AND HOVEN**
  STEVEN WADE
- ✗ **ROY BROWN**
- ✗ **BULL MOUNTAIN LANDOWNERS ASSN**
  CHARTERS
- ✗ **BURLINGTON NORTHERN SANTA FE RAILWAY**
  PAT KEIM
- ✗ **DAVID CASWELL**
- ✗ **CENEX PIPELINES**
  MIKE STAHLY
- ✗ **CENTURYTEL**
  CHRIS WATKINS
- ✗ **CLARK FORK COALITION**
  KAREN KNUDSEN
- ✗ **KAREN CLUVER**
- ✗ **CMS OIL AND GAS CO**
  DON ANDERSON
- ✗ **CONOCO**
  JOHN AUGUSTINE
- ✗ **CONOCO**
  PAUL GOULD
- ✗ **JACKI CRANDALL**
- ✗ **CRG**
  BOB ZIMMERMAN
- ✗ **SEN. WILLIAM CRISMORE**
- ✗ **ED CUMMINGS**
- ✗ **NANCY DARNELL**
- ✗ **TIM DAWS**
- ✗ **DOUG DAY**
- ✗ **SEN. STEVE DOHERTY**
- ✗ **DONEY CROWLEY BLOOMQUIST AND UDA**
  JOHN BLOOMQUIST
- ✗ **JOHN DUNCAN**
- ✗ **CARL ERB**
- ✗ **TERESA ERICKSON**
- ✗ **EXPRESS PIPELINE CO**
  FLORENCE MURPHY
- ✗ **EXXON CO USA**
  BILL TANNER
- ✗ **CHRIS GALLUS**
- ✗ **MR. BOB GILBERT**
- ✗ **SEN. BILL GLASER**
- ✗ **REP. GEORGE GOLIE**
- ✗ **GOUGH SHANAHAN JOHNSON AND WATERMAN**
  REBECCA WATSON
- ✗ **SEN. DUANE GRIMES**
- ✗ **SEN. LORENTS GROSFIELD**
- ✗ **SHIRLEY HAGER**
- ✗ **SEN. MIKE HALLIGAN**
- ✗ **GERHARD HELM**
- ✗ **DENNIS HEMMELBUGER**
- ✗ **HOLLAND & HART**
  DONALD W. QUANDER

✗	**HUGHES KELLNER SULLIVAN AND ALKE**	
	JOHN ALKE	
✗	**INTERBEL TELEPHONE**	
	MARK JOHNSTON	
✗	**JEFFERSON COUNTY COMMISSION**	
✗	**REP. CAROL JUNEAU**	
✗	**DICK JUNTUNEN**	
✗	**W. JAMES KEMBLE**	
✗	**LINCOLN ELECTRIC**	
	DENNIS DELONG	
✗	**SARAH LYONS**	
✗	**CLIFFORD LOCKE**	
✗	**ROGER AND MARION LUND**	
✗	**REP. GARY MATTHEWS**	
✗	**KAE MCCLOY**	
✗	**MEIC**	
	JEFF BARBER	
✗	**DR. DAVID METCALF**	
✗	**MONTANA ASSOCIATION OF COUNTIES**	
	GORDON MORRIS	
✗	**MONTANA ASSOCIATION OF REALTORS**	
	STEVE SNEZEK	
✗	**MONTANA CONTRACTORS ASSOCIATION**	
	MIKE FOSTER	
✗	**MONTANA DEPARTMENT OF AGRICULTURE**	
	TIM MELOY	
✗	**MT DEPARTMENT OF ENVIRONMENTAL QUALITY**	
	VIC ANDERSON	
✗	**MT DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION, TRUST LANDS**	
	MARY LEE NORRIS	
✗	**MONTANA DEPARTMENT OF TRANSPORTATION**	
	BOB FISHER	
✗	**MT DEPARTMENT OF TRANSPORTATION**	
	THOMAS MARTIN	
✗	**MT DEPARTMENT OF TRANSPORTATION**	
	TIM REARDON	
✗	**MONTANA ELECTRIC CO-OPERATIVES ASSN**	
	GARY WIENS	
✗	**MONTANA FARM BUREAU**	
	LORNA KARN	
✗	**MONTANA FARMERS UNION**	
	KEN MAKI	
✗	**MONTANA LEAGUE OF CITIES AND TOWNS**	
	ALEC HANSEN	
✗	**MONTANA PETROLEUM ASSOCIATION**	
	GAIL ABERCROMBIE	
✗	**MONTANA POWER CO**	
	ED BARTLETT	
✗	**MONTANA POWER COMPANY**	
	MR. BUD ANDERSEN	
✗	**MONTANA POWER CO**	
	J. MICHAEL PICHETTE	
✗	**MONTANA REFINING CO**	
	DEXTER BUSBY	
✗	**MONTANA STOCKGROWERS ASSN**	
	STEVE PILCHER	
✗	**MONTANA TELECOMMUNICATIONS ASSOCIATION**	
	GEOFF FEISS	
✗	**MORRISON & MAERLE**	
	MR. TIM BERRY	
✗	**NEMONT TELEPHONE CO-OP INC**	
	BARRY BILLINGSLEY	
✗	**SEN. LINDA NELSON**	
✗	**REP. MARK NOENNIG**	
✗	**NORTHERN PLAINS RESOURCE COUNCIL**	
	AARON BROWNING	
✗	**NORTHERN PLAINS RESOURCE COUNCIL**	
	ALAN ROLSTON	
✗	**PACIFIC POWER & LIGHT**	
	KEN MORRISON	
✗	**MIKE REISNER**	
✗	**ROCKER SIX CATTLE CO**	
	WALLACE D. MCRAE	
✗	**GEORGE ROSSETTER**	
✗	**SEN. GLENN ROUSH**	
✗	**REED SMITH**	
✗	**PETER STANLEY**	

✗ **BOB STEVENS**
✗ **REP. JAY STOVALL**
✗ **MIKE STRAND**
✗ **REP. LILA TAYLOR**
✗ **BETTY THISTED**
✗ **3 CIRCLE RANCH**
ART HAYES JR
✗ **TOUCH AMERICA**
JOHN FITZPATRICK
✗ **SIDNEY TSCHAEKOFSKE**
✗ **REP. CARLEY TUSS**
✗ **US WEST/QWEST**
BARBARA RANF

✗ **CHRISTINE VALENTINE**
✗ **CAROLYN WALKER**
✗ **WASHINGTON CORPORATION**
RUSS RITTER
✗ **WITTICH LAW OFFICES**
ART WITTICH
✗ **YELLOWSTONE PIPELINE CO.**
RANDY BOOTH
✗ **YELLOWSTONE PIPELINE COMPANY**
✗ MR. LARRY SPRINGER